A TREATISE OF TESTAMENTS AND LAST WILLS,

Fit to be understood by all men, that they may know, Whether, Whereof, and How, to make them.

Compiled out of the Laws Ecclesiasticall, Civill and Canon, as also out of the Common Laws, Customes and Statutes of this Realm.

By *HENRY SWINBURNE*, sometimes Judge of the Prerogative Court of YORK.

The Fourth Edition, very much enlarged with many choice Cases, and all such Statutes relating to this Subject as have been published unto this time. With an exact Table to the whole.

2 KINGS 20. 1.

Put thine house in order, for thou shalt die, and not live.

LONDON,

Printed by *George Sawbridge*, *Thomas Roycroft*, and *William Rawlins*, Assigns of *Richard Atkins* and *Edward Atkins* Esquires, 1677.

Cum gratia & privilegio Regiæ Majestatis.

A
TREATISE
OF
TESTAMENTS
AND LAST
WILLS

To the Reader.

GReat and wonderfull is the number of the manifold Writers of the Civill and Eccleſiaſticall Laws, and ſo huge is the multitude of their ſundry ſorts of Books, as Lectures, Counſels, Tracts, Deciſions, Queſtions, Diſputations, Repetitions, Cantels, Clauſules, Common opinions, Singulars, Contradictions, Concordances, Methods, Summs, Practicks, Tables, Repertories, and Books of other kinds, (apparent Monuments of their endleſs and invincible labours,) that, in my conceit, it is impoſſible for any one man to reade over the hundredth part of their Works, though, living an hundred years, he did intend none other work. Wherefore by the publiſhing of this *Teſtamentary* Treatiſe I may be thought to pour water into the Sea, to carry Owls to *Athens*, and to trouble the Reader with a matter altogether needleſs and ſuperfluous. But yet for all this, in caſe this one little Book may ſerve in ſtead of many great Volumes, then I hope that, in the equal judgement of ſuch as be indifferently affected, the ſame is rather to be admitted as commodious, then rejected as ſuperfluous.

And now believe me, (gentle Reader) I have deſired earneſtly and endeavoured carefully (according to the meaſure of ſuch ſlender skill as God hath vouchſafed me, and as convenient leiſure from other occaſions of needfull profit and healthfull diſport have permitted) that this one little Book, which here I do preſent unto thy courteous hands, may ſtand in ſtead of many bigger Books.

For whereas by the Supreme Authority and inviolable Power of the High Court of Parliament holden in the five and twentieth year [a] of the Reign of the moſt Renowned King of this Land *Henry* the Eighth, of famous and happy memory, it was enacted and eſtabliſhed, (amongſt other Statutes then made, and ſince that time revived in the firſt year of Her Majeſtie's [b] moſt gracious Reign that laſt was,) That ſuch Laws Eccleſiaſticall being then already made, which be not hurtfull or prejudiciall to the Prerogative Royall, nor repugnant to the Laws, Statutes and Cuſtomes of this Realm, ſhall ſtill be uſed and executed as they were before the making of that Act, untill ſuch time as they were viewed, ſearched, or otherwiſe ordered or determined, by two and thirty perſons, or the more part of them, according to the tenour, form and effect of the ſaid Act: which Laws ſo eſtabliſhed, revived and

The Cauſes wherefore the Authour of this Book undertook this Work.

[a] *Stat. H. 8. an. 25. cap. 19.*

[b] *Stat. Eliz. an. 1. c. 1.*

confirmed, and not without good cauſe and deep conſideration, (in divers Statutes made during the Reigns as well of the ſaid moſt Noble King *Henry* the Eighth [c], as of the moſt Godly Prince *Edward* the Sixth [d],) are termed or intituled, for the more honourable account thereof, with the reverend and ſacred Name of *The King's Eccleſiaſticall Laws*: like as in thoſe Countries and Churches of *Germany* which have received the Goſpell, the Canon Law is admitted and obſerved ſo far forth as it is not repugnant to the New Teſtament *, and is at this day the Eccleſiaſticall Law of their Conſiſtories:

[c] *Stat. H. 8. an. 27. c. 20. & an. 32. c. 7.*
[d] *Stat. Ed. 6. an. 2. c. 13.*

**Schudivinus Tract. de Nuptiis part. 4. tit. de Divortio, n. 13. fo. 48.*

Whereas alſo the Civill Law, ever ſince the Eccleſiaſticall Law was made, had been deemed and judged for part and parcell of the ſame Eccleſiaſticall Law, in caſes wherein it doth not differ from the ſame [f]: For whereas theſe two Laws be not contrary, the one is ſuppletory of the other, and being mutually incorporated do both make one body [g]; otherwiſe the Civill Law, being contradicted by the Eccleſiaſticall Law, ought to be ſilent in the Eccleſiaſticall Court [h]:

[f] *C. 1. de no. op. nunc. c. clerici. de jud. extra. c. ſi in and. diſt. 10. § ſi vero Eccleſiaſticum. in Auth. ut clerici apud propr. Epiſcopos.*
[g] *Panor. in d. c. 1. de no. op. nun. Vaſquius de ſucceſſ. creat. l. 3. §26. n. 10. Benedict. Capra. Theſaur. com. op. verb. leges, f. (mihi) 403. n. 23.*
[h] *D. 1. de no. op. nunc. gloſſ. in c. 2. de arb. l. 6. Are. in d. c. clerici. de judic. extra. quæ ſententia communiter approbatur, teſte Benedict. Capra. ubi ſupra.*

And foraſmuch as theſe foreſaid Laws have not as yet been viewed, ſearched, or otherwiſe ordered or determined by thirty two perſons, or the more part of them, according to the form and effect of the foreſaid Act of Parliament: by occaſion of which defect of the view, examination, order or determination of the ſaid thirty two perſons, thoſe Civill and Eccleſiaſticall Laws Teſtamentary, not repugnant to the Laws, Statutes and Cuſtoms of this Realm, are yet (even as hitherto they have been) ſcattered and diſperſed here and there, and ſecretly hidden from the Subjects of this Realm, in corners of many Books of ſtrange Countries and forrein Language, intangled alſo and incumbred with long diſcourſes of far different argument, and no leſs number of Laws utterly impertinent to the government of this Commonwealth; ſo that the knowledge thereof, howſoever admirable, and worthy to be learned of all, cannot (as the caſe now ſtands) be ſo commodious to many, as the expenſes to be conſumed in Books would be onerous, and the travell to be employed in the ſtudy thereof would be tedious:

Videlicet, per Gualt. Haddon legum docto rem conſultiſſ. (omnium quos unquam tulit Anglia legiſtarum diſertiſſimum) lib. de Reformatione legum Eccleſiaſt.

The Summ of all the contents of this Book.

Theſe premiſed cauſes conſidered, I thought it not onely not ſuperfluous, but expedient for this Commonwealth, to make a collection of the moſt principall Laws, Civill and Eccleſiaſticall, pertaining to Teſtaments, made before the five and twentieth year of King *Henry* the Eighth: I mean, of thoſe Civill Laws which be not contrary to the Eccleſiaſticall Laws, and of thoſe Eccleſiaſticall Laws which be not any way prejudiciall or hurtfull to the Prerogative Royall, nor repugnant to the Laws, Statutes or Cuſtoms of this Realm; but agreeing peaceably amongſt themſelves, and as ſhaking hands together like friends, and like loving Brethren ſaluting and embracing each other, may now ſtill be executed, as they were before the making of

the

the ſaid Act. Amongſt which Laws Civill and Eccleſiaſticall, I thought good likewiſe (as juſt occaſion ſhould be offered, and as the opportunity of the place fitted) to inſert ſuch Statutes of this Realm, and to make mention of ſuch Cuſtoms, as well generall as particular, as be not impertinent thereunto.

The End and Uſe of this Book.

To this end and purpoſe eſpecially, that every Subject of this Realm, though he be but of mean capacity, may with little labour, and leſs charge, take a ſenſible view (as in a glaſs) of thoſe Civill and Eccleſiaſticall Laws Teſtamentary now in force, and to be obſerved and executed in the Eccleſiaſticall Courts within this Realm of *England*, (the ſame being now by God's mercifull goodneſs reduced into a narrow compaſs,) the which before could not be done without great charge and difficulty.

Another Uſe of this Book.

And albeit this be the ſpeciall mark whereat I have aimed, and the chief ſcope of this Teſtamentary Treatiſe, namely, to benefit thoſe Subjects of this Realm which heretofore have been ignorant of the Civill and Eccleſiaſticall Laws: nevertheleſs, if I be not deceived, this Treatiſe being diligently peruſed, together with the Quotations and Marginall Notes thereunto adjoyned, may in ſome ſort be profitable to thoſe *Juſtinianiſts*, or young Students of the Civill Law, who do intend to beſtow the fruit of their ſtudy in the practice thereof to the benefit of this Commonwealth. At leaſt, if no other uſe can be made thereof, yet haply it may ſerve them as a Directory, whereby they may underſtand what Laws Teſtamentary are now in force within this Realm of *England*, and conſequently, what Titles of the ancient Laws, Civill or Eccleſiaſticall, deſerve to be read with more diligence: leſt otherwiſe, not knowing to make choice of the more uſuall Laws or Titles, they beſtow equall travail in the ſtudy of Laws not equally neceſſary.

The cauſe of publiſhing this Book in our Vulgar tongue.

Moreover, I conjecture that unto theſe *Juſtinianiſts* it would have been much more acceptable, (peradventure alſo to my ſelf more commendable,) to have ſet forth this Treatiſe in the *Latine* Tongue, wherein the Laws Civill and Eccleſiaſticall, as they be originally written, ſo are they very elegantly and ſententiouſly compact; and now, by the Tranſlation thereof into our vulgar Tongue, either loſe ſomething of their former virtue, or of their naturall beauty and grace: Nevertheleſs, after I had conſidered, that by following this plauſible courſe, I ſhould pleaſure but a few, in compariſon of the reſt whom otherwiſe I might haply benefit; albeit I had once begun, and laid the foundation of the whole Tract, in ſuch terms as I found it delivered by others, yet preferring publick commodity before particular utility, or mine own commendation, (in caſe it be leſs commendable, rather to ſeek the benefit of the Commonwealth, then to hunt after private praiſe,) I did eaſily alter my former purpoſe.

That Laws transformed from their naturall ſhape, muſt needs in ſome ſort be either damnified or diſgraced, I do not think to be perpetually true: But if it be a thing ſo neceſſarily incident to all Tranſlations, that it cannot be avoided, it ought therefore to be the rather tolerated.

Suffice

Suffice it therefore these *Latine Justinianists*, that those Marginall Notes especially proper to their studies be left in *Latine*: The rest, because it belongeth to all, meet it is that it be written in such a Language as may be understood of all.

Inter causam finalem & impulsivam quid interest, præclare Tiraquellus in regulam, Cessante causa, &c. limitac. prima.

Thus (courteous Reader) I have discoursed unto thee the End wherefore I undertook this labour, the Cause which moved me so to doe, and wherefore I have published the same in the Vulgar tongue. Now it resteth that I crave thy favourable acceptance of my good will and endeavour: which if thou shalt vouchsafe to bestow, I shall not onely think my self sufficiently recompensed, but greatly enriched.

Thine most willingly to his

uttermost power,

Henry Swinburne.

An

An Analyſis of the Firſt Part; wherein is ſhewed what a Teſtament or laſt Will is, and how many kinds of Teſtaments there be.

- A Teſtament being underſtood in a generall ſenſe doth not differ from a laſt Will, § 1. Wherein if
  - An Executor be named, it is more properly called a Teſtament, §§ 1, 2, 10. which is either
    - 1. Solemn, § 9. or Unſolemn, § 10.
    - 2. Written, § 11. or Nuncupative, § 12.
    - 3. Priviledged, § 13. or Unpriviledged, § 17. Whereof ſome be
      - 1. Military Teſtaments, § 14.
      - 2. Amongſt the Teſtator's Children, § 16.
      - 3. To charitable or godly uſes, § 16.
  - No Executor be named, then it ſtill retaineth the name of a laſt Will, § 4. And doth comprehend a
    - 1. Codicil, § 5.
    - 2. Legacy or deviſe, § 6.
    - 3. Gift in regard or becauſe of death, § 7.

An Analysis of the Second Part; wherein is declared who may make a Testament, and who may not.

Every person may make a Testament or last Will, certain persons excepted, § 1. of whom some are prohibited by reason

1. They want Discretion; as
   - Children, § 2.
   - Mad folks, § 3.
   - Idiots, § 4.
   - Old men childish, § 5.
   - He that is drunk, § 6.

2. They want Freedome; as
   - Bondslaves and Villains, § 7.
   - Captives and Prisoners, § 8.
   - Women Covert, § 9.

Of which kind of persons the greater part are not utterly intestable, but in some cases onely.

3. They want some of their principall Senses; as
   - Dumb and deaf, § 10.
   - Blind, § 11.

4. They have committed some hainous Crime; as
   - Traitours, § 12.
   - Felons, § 13.
   - Hereticks, § 14.
   - Apostates, § 15.
   - Manifest Usurers, § 16.
   - Incestuous persons, § 17.
   - Sodomites, § 18.
   - Libellers, § 19.
   - Wilfull killers of themselves, § 20.
   - Outlawed persons, § 21.
   - Excommunicate persons, § 27.

In this second Part this Question also is briefly touched, *viz.*

Whether a King may bequeath his Kingdome to whom he will, § 25.

5. Of certain legall impediments; as
   - Prodigall persons, § 23.
   - He that sweareth not to make a testament, § 24.
   - He that is at the very point of death, § 25.
   - Ecclesiasticall persons, § 26.

An Analyſis of the Third Part, deſcribing what things and how much may be diſpoſed by Will.

If he would know

- What things may be diſpoſed by Will: if we regard
  - 1. Lands, Tenements and Hereditaments; they are not deviſable but in certain caſes, § 2. — Whereof ſome are appointed by
    - 1. Cuſtome, *viz.* when the lands are holden in
      - 1. Gavel-kind, § 2.
      - 2. Burgage-tenure, § 2.
    - 2. Statutes, *viz.* when the lands are holden in
      - 1. Socage tenure, § 3.
      - 2. Knights ſervice, § 3.
  - 2. Goods and chattels, they are deviſable, except in certain caſes, § 5. As when thoſe things bequeathed are ſuch as — § 6.
    1. The Teſtator hath joyntly with another,
    2. The Teſtator hath as Adminiſtrator,
    3. The goods of the Realm, *viz.* of the ancient Crown and Jewels,
    4. Belong to any of Colledge, Hoſpitall, City, Church,
    5. Deſcend to the Heir, and not to the Executor,
    6. Belong not to the Teſtator, but to another,
  - 3. Committing of the tuition of children, eſpecially within the Province of *York*. Concerning which thing divers queſtions are examined: *viz.*
    1. Who may appoint a tutor, § 9.
    2. To whom a tutor may be appointed, § 10.
    3. Who may be appointed tutor, § 11.
    4. In what manner a tutor may be appointed, § 12.
    5. What is the office / authority of a tutor, § 13.
    6. By what means the tutorſhip is ended, § 14.
- How much may be diſpoſed by Will: if we reſpect
  - 1. Lands, Tenements and Hereditaments holden in
    - 1. Socage tenure; all
    - 2. Knights ſervice; 2 parts of 3

    are deviſable, § 15.
  - 2. Goods; then in caſe the debts due by the teſtator do
    - 1. Exceed his goods and chattels, the Teſtator cannot bequeath any thing in prejudice of his Creditors, § 16.
    - 2. Not exceed his goods and chattels, but that ſomewhat doth remain clear, the Debts and Funerals deduced; of theſe clear goods, if there be
      - 1. No cuſtome, all is deviſable, § 16.
      - 2. Any cuſtome, (as there is within the Province of *York*, and in divers other places,) if the teſtator have
        - 1. Wife and children, the 3 part
        - 2. Wife alone, or children alone, the one half
        - 3. Neither Wife nor children, all

        is deviſable, § 16.

Of the forms of Teſtaments: ſome be

1. Generall to all Teſtaments, § 1. And of theſe ſome do appertain to the

1. Eſſence thereof; as the naming of an Executor, § 2. who may be appointed

1. Simply, § 4. or Conditionally, § 5.

2. To a certain time, or From a certain time, (§ 17.

3. Univerſally, or Particularly, (§ 18.

4. In the firſt degree, or In the 2. 3. &c. (§ 19.

5. Alone, or With others, (§ 20.

Concerning every which kind or form of making an Executor divers things are conſidered: eſpecially concerning the conditionall aſſignation of an executor, theſe things are examined, *viz.*

1. *What it is, and what words do make the diſpoſition to be conditionall.*

2. *How many kinds of conditions there be.*

3. *What is the effect of a condition,* § 6.

4. *Whether every poſſible condition ought to be obſerved preciſely,* § 7.

5. *Whether the condition be accounted for accompliſhed, when it doth not ſtand by the Executor or Legatary wherefore the ſame is not accompliſhed,* § 8.

6. *Whether he that is Executor, or to whom any Legacy is bequeathed conditionally, may in the mean time, whiles the condition dependeth, be admitted to the Executorſhip, or obtain the Legacy by entring into bonds to perform the condition, or elſe to make reſtitution,* § 9.

7. *Whether it be ſufficient that the condition was once accompliſhed, though the ſame do not continue,* § 10.

8. *How far thoſe conditions, whereby the liberty of making Teſtaments is hindred, be lawfull or unlawfull,* § 11.

9. *How far thoſe conditions are lawfull or unlawfull, whereby the liberty of marriage is hindred,* § 12.

10. *How far thoſe conditions are lawfull, which do prohibit alienation,* § 13.

11. *Within what time the condition may or ought to be performed, no certain time being limited by the Will,* § 14.

12. *Of the underſtanding of this condition,* If he die without iſſue, § 15.

13. *What order is to be taken concerning the adminiſtration of the goods of the deceaſed, whiles the condition of the Executorſhip dependeth unaccompliſhed,* § 16.

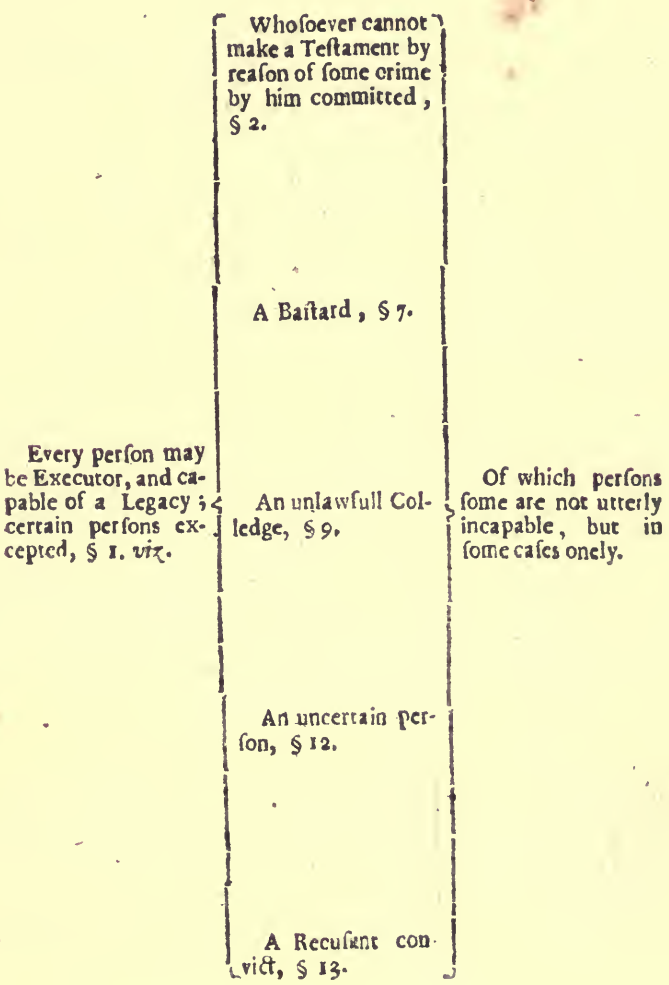
2. Appearance thereof, that is to ſay, due proof; which is to be made by Witneſſes, Writing, § 21.

2. Particular or peculiar to ſome kind of Teſtaments, *viz.* Of a

1. Solemn Teſtament, § 23.
   Unſolemn Teſtament, § 24

2. Written Teſtament, § 25.
   Unwritten Teſtament, § 26.

An Analyſis of the Fifth Part, ſhewing who may be Executor, and is capable of a Legacy.



An Analyſis of the Sixth Part; *viz.* of the Office of an Executor.

The office of an Executor teſtamentary is, firſt to deliberate and reſolve either to accept or to refuſe the Executorſhip.

1. Wherein for his better inſtruction, amongſt other things, (*ut in* § 14.) he is to conſider the eſtate of

1. The Teſtator; and therein eſpecially what goods and chattels did belong unto him, and what Debts he did owe, and whether he were Executor and Adminiſtrator to another, § 3.

2. Himſelf; namely, whether for his ſkil, diligence and fidelity, he be able and fit to undertake the office, § 3.

3. Others with whom he is to deal, chiefly of his co-executor, if any be.

2. Which things conſidered, if he reſolve to

1. Undertake the Executorſhip, then it doth belong to his office to

1. Cauſe an Inventory to be made; wherein theſe things are needfull to be known: *viz.*
   1. *Whether it be of neceſſity that an Inventory be made,* § 6.
   2. *What things are to be put into the Inventory,* § 7.
   3. *Within what time the Inventory is to be made,* § 8.
   4. *What form is to be obſerved in making of the Inventory,* § 9.
   5. *What are the benefits and effects of an Inventory,* § 10.

2. Procure the Will to be proved; wherein it behoveth the Executor to know,
   1. *Before whom the Teſtament is to be proved,* § 11.
   2. *By whom,* § 12.
   3. *When,* § 13.
   4. *In what form,* § 14.
   5. *What fees are due in this behalf,* § 15.

3. Pay debts, legacies, and Mortuaries. And here he is to learn,
   1. *How far the Executor is bound to pay debts and legacies,* § 16.
   2. *Which debts are firſt to be diſcharged, in caſe there be not ſufficient to pay all,* § 16.
   3. *How much is due for Mortuaries.*

4. Make an account. And here he is to be adverтiſed,
   1. *How needfull it is,* § 17. (§ 18.
   2. *To whom it ought to be made,*
   3. *When,* § 19.
   4. *In what manner,* § 20.
   5. *What is the end and effect thereof,* § 21.

2. Refuſe the Executorſhip, then he muſt beware that he do not adminiſter as Executor: *viz.* He muſt not doe any act which is proper to an Executor; as to receive the Teſtator's debts, or to give Acquittances for the ſame, &c. But other acts of Charity or Humanity, as to diſpoſe of the Teſtator's goods about the Funerals, to feed his Cattell leſt they periſh, to keep his goods leſt they be ſtoln; theſe things may be done without danger.

An Analyſis of the Laſt Part, ſhewing by what means Teſtaments or laſt Wills become void.

Sometimes the Teſtament

1. Even from the beginning is either void or voidable, wholly or in part, by reaſon

- 1. The Teſtator is ſuch a perſon as cannot make a Teſtament,
- 2. The things bequeathed are not deviſable,
- 3. The form of the diſpoſition is unlawfull,
- 4. The Executor or Legatary is incapable of the Executorſhip, or Legacy, } § 1.
- 5. Of Fear, § 2.
- 6. Of Fraud, § 3.
- 7. Of Immoderate Flattery, § 4.
- 8. Of Errour: in which caſe we are to diſtinguiſh whether the errour do reſpect the
  - perſon, name, quality } of the Executor, or Legatary, § 5.
  - name, ſubſtance, quantity, quality } of the thing bequeathed, § 5.
- 9. Of Uncertainty: wherein it is materiall whether this uncertainty have relation to the
  - 1. Executor, or Legatary, § 7, 8.
  - 2. The thing bequeathed, § 10.
  - 3. Date of the Teſtament, § 11.
- 10. Of Imperfection: which is either in reſpect of
  - 1. Solemnity, or 2. Will, } § 12.
- 11. The Teſtator hath no meaning to make his laſt Will; as when he ſpeaketh
  - unadviſedly, jeſtingly, boaſtingly, } § 13.

2. Being good at the beginning, is afterwards made void, either in reſpect of

1. The whole Teſtament; as by
   - 1. A later Teſtament, § 14.
   - 2. Revoking, 3. Cancelling } the Teſtament made, § 15, 16.
   - 4. Alteration of the ſtate of the Teſtator, § 17.
   - 5. Forbidding or hindering the Teſtator to make another Teſtament, § 18.
   - 6. Refuſall of the Executorſhip, § 19.
2. Particular Legacies onely: which thing doth happen by divers means; whereof ſome have relation to
   - 1. The fact of the Teſtator; as by
     - 1. ademption, 2. tranſlation } of Legacies, § 20. § 21.
   - 2. The fact of the Legatary; as if the Legatary
     - 1. Become enemy to the Teſtator,
     - 2. Accuſe the Teſtament of falſity,
     - 3. Refuſe to perform the charge impoſed in reſpect of the Legacy,
     - 4. Apprehend the Legacy of his own authority, } § 22.
     - 5. Die before the Legacy be due, § 23.
   - 3. Other occaſions; eſpecially if } the thing bequeathed be deſtroyed, § 24.

An Analysis of the Leaf Art Blowing by wind-machine

[illegible]

A Brief Treatiſe
OF
TESTAMENTS
AND
LAST WILLS, *&c.*

The Firſt Part.

§ I. Whether a Teſtament and laſt Will be both one thing, and of the manifold acceptance of the word *Teſtament.*

1. *No uſe of ſolemn Teſtaments here in* England.
2. *A Teſtament and laſt Will have divers Definitions.*
3. *Teſtament taken generally and ſpecially.*
4. *The generall ſignification of this word Teſtament.*
5. *Teſtament, taken generally, doth not differ from a laſt Will.*
6. *Laſt Will is a generall word, comprehending all kinds both of laſt Wills and Teſtaments.*
7. *A Teſtament, according to the Definition thereof, is one kind of laſt Will,* viz. *wherein an Executor is named.*

IT may ſeem that a Teſtament and a laſt Will be both one thing, and that there is no difference betwixt the one and the other, at leaſt here in *England*; becauſe we (1) have no neceſſary uſe [a] of thoſe ſolemn Teſtaments, in the making whereof the preſence of ſeven Witneſſes, together with the obſervation of many moe ceremonies, is neceſſarily requiſite by the Civill Law [b].

On the contrary, it ſeemeth that they are not both one, partly becauſe they have divers names, which doth import diverſity of things [c]; eſpecially becauſe (2) they have different definitions: for it is received for an infallible *Axiome*, that the definitions being different, the things defined are diverſe [d]. As for the former reaſon, it may be thus anſwered: that albeit our Teſtaments be unſolemn; yet it doth

[a] Tract. de rep. Ang. l. 3. cap. 7. Lindwood in c. ſtatutum. ver. probatis. Tit. de Teſt. l. 3. provincial. conſtit. Cant. Bract. de legibus & conſuetudinibus Angliæ, lib. 2. c. 25. verb. fieri autem. Haddon l. de reforma. Legum Eccleſiaſt. Angl. Tit. de teſta. c. 2. Peckius in paulatim. Inſtit. de

c. privilegium. de reg. jur. 6. [b] L. Hac conſultiſſima. C. de Teſta. § ſed cum Teſt. ordin. & infr. eod. part. §. 9. [c] L. ſi idem. C. de Codicil. [d] Everar. & Olden. loco à definitione.

not follow that therefore we have no Teſtaments, or that our Teſtaments are therefore meer laſt Wills. For an unſolemn Teſtament is a Teſtament, and that properly or in ſtrict interpretation, as hereafter ſhall be confirmed, when we ſhall ſpeak of unſolemn Teſtaments *. And ſo the concluſion ſeemeth rather neceſſary then probable, that a Teſtament and a laſt Will are not both one, but different. Notwithſtanding, this concluſion is not ſimply or perpetually true, for in ſome reſpects they are both one, though in other reſpects they differ.

* Infr. eod. part. § 10.

Underſtand therefore, that (3) a Teſtament may be taken two manner of waies; largely, and ſtrictly [f]. It is ſaid (4) to be taken largely or generally, when the ſignification of the bare name or word Teſtament (which in Latine is *Teſtamentum*) is had in conſideration [g]. This word *Teſtamentum* is as much as *Teſtatio mentis* [h], that is to ſay, a teſtifying or witneſſing of the mind. So writeth the worthy Emperour *Juſtinian*, after *Sulpitius* [i]. Which deduction others (without cauſe I confeſſe, yet not without ſcoffs) do ſharply reprehend [k]. As though, forſooth, *Juſtinian* or *Sulpitius* had contended to deliver the very Etymology of the word Teſtament, and not a certain Alluſion rather of the voice onely [l]. When this (5) word Teſtament is uttered in this generall ſenſe, it differeth not from a laſt Will [m]; and any laſt Will, be it a Codicill, or other kind, may be ſo termed a Teſtament, that is to ſay, a teſtifying or declaring of the mind [n]. And hence it is that not onely in our ſpeech, but in our writings alſo, we uſe the terms of *Teſtament* and *laſt Will* indifferently, or one for another.

[f] Bar. in l. 1. c. de ſacroſanct. Eccleſiaſt. col. pen. Gloſ. in L. 1. ff. de Teſt.

[g] Gloſ. & DD. in d. 1. ff. de Teſta.

[h] Lib. 2. inſtit. Tit. de Teſta. ord. in princ.

[i] Covar. in Rub. de Teſt. ord. ex. j. par. n. 1.

[k] Nempe Aul. Gel. & Lau. Valla, acerrimus Latinæ linguæ aſſertor, qui hanc deductionem libero ore derident: ille l. 6. c. 12. hic lib. eleg. 6. cap. 3. Quod (ut aiunt) non magis dicatur teſtamentum, à mente, quam calceamentum, quam ſalſamentum, quam ornamentum, &c.

[l] Ita enim conantur hanc notam excuſare Alciatus in L. Tabernæ. ff. de verb. ſig. Covar. in Rub. de teſt. ex. j. part. n. 2. Inter Etymologiam vero & alluſionem hoc intereſt, quod illa in verbi veritate radicata rem ipſam potius quam vocem interpretatur. Iſta nuda quadam vocabuli ſimilitudine contenta, vocem magis quam rem refert. Olden. & Everard. loco ab Etymolog.

It is taken ſtrictly, when it is accepted according to that definition invented by *Ulpianus* [o], hereafter enſuing [p]: and being taken in that ſenſe, it differeth from a laſt Will [q], yet not as oppoſite thereunto, but as the *ſpeciall* differeth from the *generall* [r]; for every Teſtament is a laſt Will, but every laſt Will is not a Teſtament. To ſpeak more plainly, thus they differ. A (6) laſt Will is a generall word, and agreeth to every ſeverall kind of laſt Will or Teſtament ‖: but a Teſtament (7) properly underſtood, is one kind of laſt Will, even that wherein *Executor* is named. For by the naming of an Executor it differeth from the reſt [t].

[m] Bar. in L. j. C. de ſa. ſan. eccl. col. pen. Bal. in L. omne verbum. C. Com. de leg. & Lindw. in. c. ſtatutum. verb. ult. vol. de teſt l. 3. Provincial. conſtit. Cant.

[n] Gloſ. in l. 2. de conſtit. Pecu. C. Bar. Bal. & Lindw. ubi ſupr.

[o] L. j. ff. de Teſtam.

[p] § Prox.

[q] DD. poſt. gloſ. in d. L. j. ff. de Teſtam.

[r] DD. ubi ſupr.

‖ Man. tit. de conject. ult. vol. l. 1. tit. 5. ubi tradit quinque ſpecies ult. vol. quarum 1 eſt Teſtamentum. Simo de Præt. de interp. ult. vol. l. 2. dub. j. fol. 9. & Phil. Franc. in Rub. de teſt. lib. 6. qui locis prædictis alias inſuper ſpecies referunt.

[t] Infr. §. n. 19.

The

§ II. The Definition of a Teſtament.

1. *What a Teſtament is.*
2. *The definition of a Teſtament unworthily reprehended.*

A Teſtament (1) is defined after this manner: *Teſtamentum eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri voluit*[a]. A Teſtament is a juſt ſentence of our Will, touching that we would have done after our death.

Some (2) there be, who do cenſure this excellent definition to be defective[b], though unworthily[c]; (but nothing can content a curious head:) whoſe errour is detected, and the definition ſuſtained, in the expoſition following[d].

[a] L. j. de Teſt. ff.
[b] Accurſ. & Paul. de caſt. in d. l. j.
[c] Quam viz. definitionem, utpote perfectiſſimam, nemini licere in controverſiam revocare, refert Michael Graſſ. Theſaur. com. op. § Teſtam. q. j.
[d] In § prox. n. 19.

§ III. A brief expoſition of the former Definition.

1. *Definitions dangerous in Law.*
2. *The cauſe of this danger.*
3. *It is rare if the definition be ſo juſt that it cannot be overthrown.*
4. *A juſt or perfect definition profitable to many purpoſes.*
5. *The occaſion of this expoſition.*
6. Juſt, *hath divers ſignifications.*
7. Juſt, *oppoſed to that which is wicked.*
8. *The Teſtator may not command any thing againſt juſtice or equity*, &c.
9. Juſt, *taken for full or perfect.*
10. *The Teſtament muſt not be unperfect.*
11. *Imperfection teſtamentary twofold.*
12. *Teſtament unperfect in reſpect of ſolemnity.*
13. *What ſolemnities be requiſite in making of Teſtaments.*
14. *Teſtament unperfect in reſpect of will.*
15. *Whether the Teſtament being unperfect in reſpect of will be void.*
16. *A farther meaning, by the word* Juſt *being taken for perfect.*
17. *Every perfect will is not a perfect Teſtament.*
18. *Their errour detected who reprehend this definition.*
19. *What maketh a Teſtament to differ from other kinds of laſt wills.*
20. *Of the manifold ſignifications of this word* Sentence.
21. *Teſtaments ought to be made with deliberation.*
22. *Such as have not the uſe of reaſon cannot make a Teſtament.*
23. *Unadviſed ſpeeches make not a Teſtament.*
24. *How it may be proved that the Teſtator had* animum teſtandi.
25. *Boaſting words do not diſpoſe.*
26. *Two kinds of judiciall ſentences*, Interlocutory *and* Diffinitive.
27. *Contrary effects of theſe two ſentences.*
28. *Teſtaments compared ſometimes to an Interlocutory ſentence; ſometimes to a Diffinitive.*

29. *The Will of the Teſtator, the governour of the Teſtament.*
30. *The meaning of the Teſtator is to be ſought diligently, and kept faithfully.*
31. *Meaning to be preferred before words.*
32. *Fear and fraud make void the Teſtament.*
33. *The Teſtator muſt be* ſui juris.
34. *The Teſtament not to be referred to another man's will.*
35. *How a Teſtament doth differ from other ſentences.*
36. *The Teſtament is of no force untill the Teſtator be dead.*

DEfinitions (1) are ſaid to be dangerous in law [a]: the cauſe (2) may be attributed to the multitude of different caſes [b], the penury of apt words [c], the weakneſſe of our underſtanding [d], and the contrariety of opinions *. For haply amongſt ſuch abundant variety of things, either we cannot diſcern the true eſſence thereof [f], or we do not aptly deliver what we conceive [g]; or elſe theſe perils being paſt, at leaſt in our own opinions, yet are we ſtill ſubject to the rigorous examination of all ſorts of men, and muſt abide the doubtful verdict of the ſharpeſt wits, and endure the dreadfull ſentence of the deepeſt judgments [h]. And (3) it is rare [i] if at the laſt, after long and ſuperſtitious revolution, one man, at leaſt among ſo many ſubtile heads, and captious conceits, do not eſpy ſome defect or exceſſe in the definition, whereby the ſame may be ſubverted [k]. Which thing if it come to paſſe, then like as when the Captain is ſlain, the ſouldiers are in danger to be diſcomfited; or as the foundation being ruinous, the building is in perill of falling; ſo the definition being overthrown, all the arguments drawn from thence, and whatſoever elſe dependeth thereupon, is in perill to be overturned [l]. No marvell then if definitions be reported to be dangerous.

But if, contrary to the common courſe, the definition be ſo juſt, ſo perfect, that it cannot be juſtly reproved [m], this (4) definition, beſides that it is not perilous, it is ſo profitable, and ſo neceſſary, that from thence, as from the root and fountain, every diſcourſe ought to take

[a] L. omnis diffinitio de reg. in ff. ubi Accur. cum ſuis ſequacibus, definitionem pro reg. ſumendam putavit. Sed probabilior mihi videtur Cagnoli & aliorum opinio, quod lex iſta loquitur de definitione proprie & dialectice ſumpta.

[b] L. neque. L. non poſſunt. ff. de Legibus.

[c] L. 4. de præſ. ver. ff.

[d] L. 2. C. de ver. ju. Macagnan. de communi opin. in principio.

* C. quia diverſitatem. in prin. de conceſ. præben. extr.

[f] Id quod nemo non fatetur eſſe difficillimum. Dec. Cagnol. & alii in d. L. omnis diffinitio.

[g] Quum plura ſint negotia quam vocabula. l. 4. de præſcrip. ver. F.

[h] L. 1. § j. ff. de dolo. DD. in Rub. Sol. matr. ff. Sane ut mirum ſit videre, & ibi, & paſſim alibi, quomodo pugnant inter ſe homines doctiſſimi in definiendis rebus. [i] Quod autem ſic ſcribitur, (Parum eſt, &c.) in d. l. omnis diffinitio, ſic legitur à Budeo, (Rarum eſt:) quæ lectio facilius ſuaderi poteſt, quum alias maneat ſermo ſubobſcurus. [k] Mantic. de conject. ult. vol. lib. 1. tit. 4. in fin. [l] Quod ſi definitionem pro regula intelligendam ſentias cum Accurſio, unde quæſo illa magna periclitatio ſubverſionis? Eſto enim tot quaſi milites occidi quot patiatur except. regula. At horum dux interim (nempe ipſa regula) non ideo proſternitur, immo firmat exceptio regulam in non exceptis: ita ut probe contra ſeipſum hac ſimilitudine fretus diſputat Accurſius, dum admoneat ut quiſque ſtet firmus regulæ, velut Bononienſi Carotio, licet aliqui capiantur de ejus cuſtodibus: Et ſic licet aliqui caſus à regula ſubtrahantur, reſpondeatur (inquit) hoc eſſe ſpeciale, & ſic regula erit firma in non exceptis. Hæc ille in gloſſ. in d. L. omnis diffinitio. Quod nihil aliud eſt quam ſi dixiſſet, regula lædi quidem poteſt, ſubverti non poteſt. Quare quum definitio de qua hic agitur adeo ſit ſubjecta periculo, ut omnino ſubverti poſſit, certe non magis erit regula, quam illud neſcio quod Carotium Bononienſe eſt definitio. [m] Nempe quod ſingulos complexa caſus converratur cum definito. Id quod vel neceſſarium eſſe ad conſtituendam legitimam definitionem contendit acriter Cagnolus, contra communem, immo negans contrariam eſſe communem. in d. L. omnis diffinitio.

his

his beginning [n]; the rather, for that thereby (amongſt many other benefits iſſuing from the definition [o], the whole nature or ſubſtance of the thing defined (which otherwiſe, for the abundance of the matter thereto belonging, may ſeem infinite) is plainly declared, and that in few words [p].

Now therefore (5) leſt this notable and moſt abſolute definition of a Teſtament above delivered, not being rightly underſtood, might ſeem either more dangerous or leſſe commodious then it deſerveth; I thought it expedient to adde this Expoſition following.

Firſt, whereas a Teſtament is defined to be a *Juſt Sentence* [q], we are to conſider that this (6) word *Juſt* hath divers ſignifications in the Law. Sometimes (7) it is oppoſed to that which is wicked, or repugnant to juſtice, equity, and to good and wholeſome manners [r]. Being taken (8) in this ſenſe, it giveth us to underſtand, that the Teſtator cannot command any thing that is wicked, or againſt juſtice, piety, equity, honeſty, &c ‖. For things unlawfull are alſo reputed impoſſible: and therefore if the Teſtator ſhould command any ſuch thing in his Teſtament, the ſame were not to be obſerved [t]. As if he ſhould will any man to be murthered; for this is againſt the Law of God [v]: or if he ſhould command his body to be caſt into the River; for this is againſt humanity [x]: or if he ſhould command his goods to be burned; for this is againſt policy [y]: or if he ſhould command any ridiculous act, or prejudiciall onely to his own credit and dignity; as if he ſhould will his buriall or funerals to be ſolemnized with May-games, or morrice-dances; for this were to manifeſt his folly, or at leaſt to make queſtion whether he were of ſound mind and memory [z]. In theſe and the like caſes the Executor, in not performing the commandments or requeſts of the Teſtator, is not onely holden excuſed, but is highly commended [a].

Furthermore (9) this word *Juſt* is ſometimes taken for *full* or *perfect* [b]. So we ſay, when a woman hath gone her full time with child, (which is commonly nine months [c],) that ſhe hath gone her juſt time. So we uſe to ſay juſt age, for full and perfect age; and ſo, juſt weight, juſt meaſure, juſt number [d], for full and perfect weight, meaſure, number *. The (10) word *Juſt*, being thus underſtood, that is to ſay, for full and perfect, all teſtamentary defects and imperfections are thereby excluded. Wherefore the Teſtament ought to be full, compleat and perfect; otherwiſe being an unperfect Teſtament, it is ſaid to be no Teſtament [f].

[n] Cic. lib. 1. offic. quod tamen Cagnolus intelligit de definitione Nominis, non Rei. Cujus ſi vera ſit opinio, & nos id ipſum obſervavimus, dum quid & quotuplex ſit hæc vox Teſtamentum ſuperius tradidimus.

[o] Ut argumentationes, quæ ſæpiſſime à definitione deducuntur, quarum quanta ſit vis & utilitas, copioſe & eleganter Olden. Topic. legal. loco à definitione.

[p] Gloſſ. & DD maxime Cagnol. in d. L. omnis diffinitio. Everard. loco à definitione.

[q] Quam Alciatus ſubſtantialem appellat, l. 9 parergon, c. 2. perfectam Bartolus in L. j. de teſta. ff. immo perfectiſſimam, nec in controverſiam revocandam, dicit Graſſ. d. § teſt. q. 1.

[r] Summa Hoſtien. tit. de teſta. § quid ſit. Sichar. in Rub. de teſta. C. n. 2.

‖ L. Nemo de leg. j. L. filius de cond. inſt. ff. Bar. in d. L. j. de teſt. n. 3. de Rebuff. in L. juſta. ff. de verb. ſig. fol. 888.

[t] L. conditiones. l. filius de cond. inſtit. ff. Summa Hoſtien. d. tit. de teſta. § quid ſit. & Rebuff. in d. L. juſta.

[v] Exod. c. 20.

[x] Quidam. ff. de cond. inſtit. Sichar. in Rub. de teſta. n. 2. C.

[y] Expedit enim Reip. ne quis re ſua male utatur. § ſed & n. ajor. inſtit. De his qui ſui vel al. jur.

[z] D. L. quidam. & L. condit. el. 1. & 2. ff. de cond. inſt. Sichard. in d. Rub. de teſta. C. Caſtrenſ. in L. Non oportet. C. de his quibus ut indig.

[a] D. L. quidam. & ibi Ang. Paul. de caſtr. & alii. & videas etiam Mantic. de Conject. ult. vol. li. 2. tit. 5. n. 9.

[b] Bar. in d. L. 1. ff. de teſta. Sichard. in Rub. de teſta. C. Covar. in Rub. de teſta. ext. prim. part.

[c] Tiraquel. in Reb. L. ſi unquam. C. de revoc. donat. verb. ſuſceperit. ubi non minus eleganter quam diligenter docet quamdiu mulier uterum ferre valeat.

[d] L. Filius familias. de leg. 3. ff. Rebuff. in L. juſta. de verb. ſig.

[*] Covar. in Rub. de teſt. ext. pri. part. n 4. ejuſd. farinæ eſt quod ibi dicitur, Juſtus exercitus, juſta claſſis, juſta pugna, juſtæ ſtationes, juſtum volumen, juſtus error, &c. Adde quod ſcribit Minſing. in Rub. L. de teſta. lib. 2. inſtitu. jur. Civil.

[f] § Ex eo. inſtit. Quibus mod. teſt. inſir.

The (11) Testament is said to be imperfect in two respects, *viz.* in respect of *Solemnity*, and in respect of *Will* or meaning [g]. The (12) Testament is imperfect in respect of solemnity, wherein some of the Legall requisites, necessary in the making of a Testament, be wanting [h]. Hereupon divers writers have interpreted the word *Just* in this definition to signify *Solemn* [i], that is to say, furnished with such due rites and formalities as the law requireth. Howbeit (13) all the superfluous solemnities of the Civill law are vanished out of the Kingdome of *England*. Onely those solemnities remain which be *Juris Gentium* [k]. Which being the common law to all nations through the world, ought to take place, and is to be observed, unlesse by the particular laws of some nations or countries, written or customary, some other provision be established or practised [l]. So that with us it is sufficient, to the effect of executing the Testament, that the will and mind of the Testator do appear by two sufficient witnesses [m]: Saving where lands, tenements and hereditaments are devised; for then the solemnity of writing is also necessary, and that to be done in the life-time of the Testator [n]. The (14) Testament is said to be imperfect in respect of will, which the Testator hath begun, but cannot finish as he would [o]. If therefore (15) whiles the Testator is in making his will, and whiles he yet intendeth to proceed farther at that present, either by adding or diminishing any thing to or from his Testament, or by altering any thing therein, (as commonly men do use to put in, put out, and change many things before they make an end [p],) he be suddenly stricken with sickness, insanity of mind, or other impediment, whereby he cannot then finish or perfect the same as he would, and so die: this his Testament, being imperfect in respect of will, is therefore void, even touching that which was done, which he did intend then to alter, before he had made an end [q]; by reason of the defect of the Testator's consent, without which the Testament is not of any value [r]. Nevertheless, not every Testament which is termed imperfect in respect of will, is by and by wholly of no force: for in many cases, yea and for the most part, such Testaments are effectuall for so much as is already done, as elsewhere more abundantly is confirmed ‖.

There is yet (16) also a farther Mystery or secret meaning included in this word *Just*, in that it doth signifie full or perfect, which meaning is this: That the Testament ought to be compleat not onely in respect of solemnity, and of will, as is aforesaid; but also that it ought to be perfect in this respect especially, that there be no want of any thing which is necessary to the constitution and denomination of a Testament [t]. For if (17) it do contain onely a perfect declaration of the Testator's will, and want that which is requisite to make a Testament, it may well be termed a perfect will, for a Codicill, a Legacy, a gift in respect of death, &c. (they are all perfect in their kind [v]:) but it cannot be termed a Testament, much less a perfect

[g] Bar. & alii in L. hac consultissima. § ex imperfecto. C. de testa. Boer. dec. 240.

[h] Sichard. in d. § ex imperfecto.

[i] Viglius in tit. de testa. ordin. inst. n. 29. Minsf. eod. nu. 5. Sichard. in Rub. de testa. C. n 2.

[k] Infr. eod. part. § 9.

[l] Nam jus gentium omnibus est commune, & per totum terrarum orbem etiam hodie viget, nisi aliud specialiter sit provisum vel jure scripto, vel statuto, vel consuetudine. Zas. in Q. Jus civile. ff. de inst. & jure, n. 15.

[m] Lindw. in statutum. verb. proba de testa. l. 3. provincial. constit. Cant.

[n] Stat. H. 8. an. 32. c. prim.

[o] Bar. Sichard. & alii in L. Hac consultissima. § ex imperfecto. C. de testa. L. si quis ita. ff. eod. tit. L. furios. C. qui testa. fac. pos.

[p] Jul. Clar. § testam. q. 7. in fin.

[q] D. L. si is qui. & L. furios. Jas. & Sichard. in L. pen. de Instit. & sub. C.

[r] Sichard. in d. L. hac consultissima. § ex imperfecto. de testa. C. n. 1.

‖ Infr. part. 7. § xii.

[t] Bar. in L. j. de testa. ff. Viglius & Minsing. in tit. de test. ordin. in princ. Alciatus in L. Tabernæ. de verb. sig. ff. Covar. in Rub. de test. extr.

[v] Paul. de castr. in d. L. j. de test. ff. Nec ideo musca dicitur imperfectum animal quod sit minor Elephante, inquit Covar. in Rub. de test. extr. j. part. n. 3. Bar. in d. L. j. de test. ff. Minsing. in d. tit. de testa. ord.

Testa-

Teſtament. This (18) ſingular ſenſe and ſignification of the word *Juſt*, becauſe ſome interpreters did not perfectly apprehend, they did reprehend the definition, as not perfect, nor convertible with a Teſtament; that is to ſay, not agreeable to a Teſtament alone, but common to every kind of laſt will [x]: for that they alſo were perfect every of them in their ſeveral kinds [y]. Wherein nevertheleſs they were deceived, for the perfection that is here meant, is an abſolute perfection, ſuch as none other laſt will hath but onely a Teſtament, even that perfection that giveth both name and nature to a Teſtament [z]. So that the defect was not in the definition, but in their underſtanding. To conclude therefore, this perfection eſpecially being here underſtood by this word *Juſt*, which is proper and peculiar to a Teſtament, the definition remaineth irreprehenſible, and is agreeable to a Teſtament onely; excluding both Codicil, Legacy, gift in regard of death, and every other kind of laſt will [a], having every thing, and wanting nothing, which appertaineth to the eſſence of a Teſtament [b].

[x] Accurſ. & Paul. de caſtr. in d. L. j. de teſt. ff.

[y] Paul. de caſtr. in d. L. prim.

[z] Bar. (omnium Legiſtarum facillime princeps) Bald. Ange. Imol. Aretin. in d. L. j. de teſt. ff. Porcus Viglius, Minſing. Juſt. de teſta. ordi. Vaſq. de ſucceſ. crea. L. j. in prin. n. 26.

[a] Bar. in d. L. prim. de teſta. ff. Viglius & Minſing. in d. tit. de teſta. ordin. Inſtit. Covar. in Rub. de teſta. ext. part. prim.

Now (19) if you will ask me what kind of perfection, or what ſpeciall thing this is, without the which the will how perfect ſoever otherwiſe is no Teſtament, I have told it before [c]. It is the naming or appointment of an Executor [d], (who in the civill law is called *Hæres* *, heir.) This is ſaid to be the foundation, the ſubſtance, the head [f], and is indeed the true formall cauſe of the Teſtament [g], without which a will is no proper Teſtament [h], and by the which onely the will is made a Teſtament [i].

[b] Mantic. de conject. ult. vol. l. 1 tit. 4 n. 10. Graſſ Theſaur. com. op. § teſta. q. 1. Covar. in Rub. de teſta. extr n. 14. 3. & 4 ſup. § 1. in fin.

[c] Supr. § 1. in fin.

[d] L. j. de hæred. inſt. L. pri. de vulg. & pup. ſub. L. Hæredes palam de teſt. L. quod per manus de. Codicil. ff. § ante inſtitut. de Lega. Bracton de leg. & conſuet. Ang. lib. 2. c. 26. Brooke Abridge. tit. teſt. n. 20.

Sentence. This word (20) *ſentence* is a generall word, and hath many ſignifications. It is ſometimes taken for a ſhort pithy ſaying of a grave or wiſe man [k]. It is ſometimes taken for a decree pronounced by the Judge [l], and in other places it is otherwiſe taken [m]. It is taken in this place for an adviſed purpoſe, or deſtination of the Teſtator's mind [n], which purpoſe or deſtination of mind being reduced into act (otherwiſe retained within the compaſs of ſole cogitation, it is no Teſtament, but an abortive will [o],) is termed a *ſentence* by a certain excellency [p]: becauſe in (21) our teſtaments, we ſhould ſhew our ſelves both wiſe and juſt; repreſenting as it were the perſons of grave men,

Plowd. in caſu inter Greisbrook & Fox, & plenius infr. part. 4. § 2. * D. § ante. inſt. de deleg. Haddon de refor. leg. eccleſiaſt. Angl. Doct & Stud. l. 2. c. 11. tract. de repub. Angl. l. 3. c. 9. ita ut Executor teſtamentarius, jure quo nos utimur, non tam re quam nomine differt ab eo quem jus civile nuncupat hæredem. infr. 6. part. [f] D. § ante. inſt. de delega. [g] Weſen. in part. tit. de teſt. ff. [h] L. quod per manus. ff. de Codicil Brooke Abridg. tit. teſta. n. 20. Plowden in caſu inter Greisbrook & Fox, fol. 276. Haddon ubi ſupr. [i] Vide infr. part. 4. § 1, 2. [k] Cujus generis ſunt ſententiæ Ciceronis, Proverbia Salomonis, & aliorum hominum, cum Philoſophorum, tum Theologorum, dicta memorabilia. [l] Paul. de caſtr. Lancel. Doc. in L. j. de teſta. [m] Veluti pro opinione, pro perſuaſione. Coratius de com. opin. in princ. Dictionar. Calepin. verb. Sententia. Quandoque ſumitur pro pœna à jure inflicta. Franc. in c. fin. de conſti. 6. in fin. [n] Juſta ſententia quid ſignificet, breviſſime & elegantiſſime (ut ſemper ſolet) æquiſſimus ille juris interpres Johannes Oldendorpius. Hoc eſt, (inquit) vera ac omnibus modis abſoluta animi deſtinatio, quam ſi ad alias in vita deliberationes conferas, longe excellit omnes. De action. claſſ. 5. in princ. [o] Bald. in L. quidam cum filio fa. ff. de hæred. inſtit. Tract. de Conjecturat. mente. teſt. def. fol. 14. n. 6. ubi refert eam eſſe voluntatem abortivam quæ conſiſtit in intentione, & non etiam in diſpoſitione. Quod fortaſſe fuit in cauſa, quod Anglus quidam vertendo dictam definitionem à latino idiomate in vulgare noſtrum ſic tranſtulit; Juſtam ſententiam, *A true declaration.* Termes of Law. Verb. Teſtament. [p] Covar. in Rub. de teſt. ext. j. part. n. 4.

and

and of juſt Judges. And certainly if all the actions of this life ought to be performed with wiſedome and conſtancy; if nothing ought to be attempted without carefull conſideration, and due premeditation [q]: how much more ought the laſt act of our life, our farewell to the world, the memoriall of our immortality [r], even our teſtaments and laſt wils, to be framed with deliberation, ſeaſoned with diſcretion, and builded upon ſound and conſtant determination ‖? without the which it hath neither ſhape nor ſavour of a Teſtament; nor is able to ſtand for a Teſtament, when it ſhall be tried or proved in the form of Law [t]?

Seeing then every teſtament is a *ſentence*, we may note divers things. Firſt that (22) ſuch perſons as have not the uſe of reaſon or underſtanding, as mad folks or idiots, are juſtly excluded from making of teſtaments [v]: for their devices being full of folly, their deeds muſt needs be void of diſcretion; and their wits being ſenſeleſs, their words are utterly unworthy the name of a ſentence: howſoever ſometimes, more by chance then by cunning, they may ſeem to ſpeak wiſely [x].

Secondly, (23) that albeit the teſtator be of perfect mind and memory, nevertheleſs if he ſpeak any thing either unadviſedly or incidently; as if a man when he is in perfect health, be demanded who ſhall be his Executor, or have his goods after his death, (which queſtion is very common amongſt familiars,) he forthwith nameth ſome perſon, to whom he ſaith he will leave his goods after his death; this is not to be taken for a teſtament or laſt will, neither is that perſon named to be admitted Executor, nor to have his goods [y]; unleſs it be (24) proved, that the teſtator, at the time when the words were ſpoken, had *Animum Teſtandi*, that is to ſay, a mind or purpoſe then and thereby to make his teſtament or laſt will. Which mind and purpoſe muſt be proved by circumſtances [z], (for words alone are not ſufficient [a]:) as that he framed or ſettled himſelf ſeriouſly to the making of his laſt will, being then perhaps very ſick, or required them which were preſent to bear witneſſe of his will [b], *&c.* Otherwiſe, even as the opinion of a Judge, being delivered privately, or extrajudicially, touching the event of any ſuit, is but a prediction of that which is likely to enſue, and not the ſentence it ſelf, or finall judgement whereby the controverſy is decided [c]: (which ſentence ought to be pronounced judicially, after due examination of the cauſe [d]:) So when the Teſtator doth onely foretell, whom afterwards, or at ſome other time, he doth intend to make his executor, or to leave his goods unto, this is but a ſignification of a future act *, and ſo not the Teſtament it ſelf, wherein is required preſent and perfect conſent [f]. (25) Much leſſe is that to be taken for a Teſtament, whenas any man raſhly, boaſtingly, or jeſtingly, affirmeth that he will make this or that man his Executor, when he hath no meaning at all, neither at that time, nor any other time, to make him Executor [g]. For without meaning, or conſent of mind, the Teſtament is altogether without life; and is no more a Teſtament, then a painted Lion is a Lion.

[q] Cic. lib. 1. offic.

[r] Olden. de action. claſſ. 5. in prin.

‖ Adde quod quæ vivi facimus dicimuſve, ea aliquando non magni ſunt momenti, & ſi quid diſpliceat, obvia nobis ſunt emendandi remedia & formulæ: verum quod in cauſam mortis deſtinamus, id ita proponimus, ut poſt hanc vitam nunquam mutari velimus. Old. ubi ſupra.

[t] Conſule Socin. Jun. conſ. 179. vol. 2. Hotto. conſ. 5. vol. 1. Hyero. Franc. in L. quicquid de reg. jur. ff.

[v] Vide infr. part. 2. §§ 2, 3, 4, 5, & 6.

[x] Jaſ. & Dec. in L. furioſi. C. de teſta. contra Jo. Andr. Panor. & alios in c. ad noſtram de conſuetud. ext. cum temperament. tamen, ut infra 2. part. § 4.

[y] L. Lucius. L. Divus. de mil. teſta. ff. § plane. inſtit. de mil. teſta. Soc. Jun. conſil. 179. vol. 2. quod videas velim & perlegas diligenter.

[z] Menoc. de Arb. jud. caſu 496. ubi copioſe reſpondet, quæ & quot conjecturæ ſufficiant.

[a] Gloſſ. in § plane. Inſtit. de teſta. mil. Hottoman. conſ. 5. vol. 1.

[b] Gloſſ. & DD. in d. L. Divus. Menoch. in d. caſ. 496. & plenius infra part. 7. § 13.

[c] L. ex ſtipulatione. C. de ſenten. & interlocu. Spigel. Lexic. verb. ſentent.

[d] Bar. & alii in d. L. ex ſtipulatione. Vantius Nullit. viz. ex defect. proceſſ. n. 69. *Pariſ. concil. 24. lib. 3. n. 10.

[f] Hottoman. lib. 1. conſil. 5. Corne. conſ. 149. vol. 2.

[g] Alciat. parerg. lib. 2. c. 12. Pariſ. conſil. 127. vol. 1. n. 40, 41. Hyero. Franc. in L. quicquid de reg. jur. ff. n. 3.

Thirdly,

Thirdly, by this that a Teſtament is termed a *ſentence*, there is a farther conſideration offered to our underſtanding, in reſpect of the analogy betwixt a judiciall ſentence and a Teſtament. Of Judiciall (26) ſentences there be two ſorts; the one *interlocutory*, the other *definitive* [h]. An *interlocutory* ſentence is a decree given by the Judge, betwixt the beginning and ending of the cauſe, touching ſome incident or emergent queſtion [i]. A *definitive* ſentence is a finall decree, whereby the principall cauſe and controverſy is decided, in condemning or abſolving the party convented [k]. Theſe (27) two ſentences have theſe two contrary effects. The one of them, that is to ſay, the *ſentence interlocutory*, may be revoked at any time ſo long as the principall cauſe dependeth undecided [l]. But the *ſentence definitive* cannot be revoked [m]. The (28) Teſtament of any man, ſo long as he liveth, may be compared to a *ſentence interlocutory*. For it may be revoked or altered at any time, and as oft as the Teſtator will, whiles he liveth, even untill the laſt breath [n]: and of theſe the laſt will prevaileth [o]. But after his death, it is compared to a *ſentence definitive* [p]: and as it cannot be revoked by the dead man, ſo ought it not to be revoked by any other, but obſerved as a law [q], and executed as the *ſentence* of a Judge [r]. And they are to be puniſhed that do hinder the execution of the ſame †.

[h] Tit. de ſent. & interl.om.Jud.C.

[i] Specul. de ſentent. § ſpecies.

[k] Specul. ubi ſupra.

[l] L. quod.inſtit. ff.de re jud. c. cum ceſſante, de app. extr. L. ſi quis juſiurand. § fin. C. de reb.cred.

[m] L. Judex.de re jud. l.1.de queſtion.ff. L.1. de reſcind.ſen.C. Rebuff.in d.L. quod juſſit, ubi multifariam limitat utramque concluſionem.

[n] L.4. de Adimen.leg.ff. c.Marthæ. de celeb.miſſ.ext. [o] § poſteriore.Inſtit. Quib.mod.teſt.infir. [p] D.c.Marthæ. [q] L.1.C.de ſacroſanct.Eccleſ. [r] Olden.de action. claſſ.5. in prin. † c.Statut.de teſta.cant.c.ſtatuimus. eod.tit. l.provincial.conſtitut.Ebor.

It followeth in the definition (*of our will*) concerning this word *will*. It (29) is written, that the will or meaning of the Teſtator is the Queen or Empreſſe of the Teſtament [t]. Becauſe the *will* doth rule and govern the Teſtament, enlarge and reſtrain the Teſtament, and in every reſpect moderate and direct the ſame [v], and is indeed the very efficient cauſe thereof [x]. The (30) will therefore and meaning of the Teſtator ought before all things to be ſought for diligently; and being found, ought in any wiſe to be obſerved faithfully [y]. It ought to be ſought for as earneſtly as the hunter ſeeketh his game [z]: and (31) as to the ſacred anchor ought the Judge to cleave unto it, pondering not the words, but the meaning of the Teſtator [a]. For although no man be preſumed to think otherwiſe then he ſpeaketh [b], for the tongue is the utterer or interpreter of the heart [c]; yet cannot every man utter all that he thinketh, and therefore are his words ſubject to his meaning. And as the mind is before the voice, (for we conceive before we ſpeak,) ſo is it of greater power; for the voice is to the mind, as the ſervant is to his Lord [d]. Here I might produce many authorities and manifold examples for the confirmation of this point; which nevertheleſſe I hold more fit to be handled elſewhere, after the ſtudious reader is better inſtructed in other materiall parts of this diſcourſe of more eaſy comprehenſion and digeſtion: which method if I ſhould not obſerve, I might fall into *Scylla* or *Charybdis*, leading the reader into difficulty, or into deſpair of attaining that which is propounded. For which cauſe it is excellently written by *Juſtinian*, *Si ſtatim rudem adhuc & infirmum animum ſtudi-*

[t] Sichard.in Rub. de teſta.C.n.2.in fin.

[v] L. in conditionibus de cond. & de mon. L. ſi mihi. § in legat. de leg.j.ff.

[x] Weſenb. in tit. de teſta.ff.

[y] Vide infr. part. 4. § 4.

[z] Bald. in L. pen. de neceſſ.hæred.inſtitut. C. Socin. Jun. conſ. 144.vol.2.n.23.

[a] § noſtra. inſtit. de leg.

[b] L. Labeo. § cæterum de ſup.leg.ff.

[c] Weſenb. in tit. de verb.ſig.ff.

[d] D.L.Labeo.

oſi multitudine ac varietate rerum oneraverimus, horum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore ejus, ſæpe etiam cum diffidentia, (quæ plerumque juvenes avertit,) ſerius ad id perducemus, ad quod leviore viâ ductus ſine magno labore, & ſine ulla diffidentia, maturius perduci potuiſſet ‖.

‖ Lib. 1. Inſtit. tit. de Juſt. & jure, § 1.

Where it is ſaid in the definition, *of our will*, the interpreters do gather by this word *our*, that the Teſtator ought to enjoy all liberty and freedom in making of his will; that is to ſay, full power and ability to withſtand all contradiction and countermand *. And therefore (32) if the Teſtator be compelled by violence, or urged by threatnings, to make his Teſtament; the Teſtament being made by juſt fear, is uneffectual [f]. Likewiſe if he be circumvented by fraud, the Teſtament loſeth his force [g]. For albeit honeſt and modeſt interceſſion, or requeſt, is not prohibited; yet theſe fraudulent and malicious means, whereby many are ſecretly induced to make their Teſtaments, are no leſs deteſtable then open force [h].

* Mantic. de conject. ult. vol. lib. 1. tit. 3. n. 10.

[f] L. 1. Quod me cauſa. L. fin. Si quis aliquem teſtari prohib. ff. infr. part. 7. § 2.

[g] D. L. fin. Si quis aliq. teſtari prohib. ff. & infr. par. 7. § 3.

[h] Olden. de Action. claſſ. 5. in princ. & infr. part. 1. § 3.

Moreover by (33) occaſion of the aforeſaid words, *our will*, the writers do collect that the Teſtator muſt be *ſui juris*, that is to ſay, a free man; not in ſubjection, as bondmen and other like perſons [i], of whom mention is made hereafter [k], which have not liberty to make a Teſtament.

[i] L. qui in poteſtate. ff. de teſta. & L. ſi quæramus eod.

[k] Infr. part. 2. § 7, 8, &c.

Likewiſe (34) by thoſe words, *our will*, are excluded thoſe wills which depend of another man's will [l]. Wherefore if the Teſtator ſhould refer his will to the will of another; as if he ſhould ſay, I give thee leave and authority to make my will, and to make Executor for me who thou wilt, *&c.* if hereupon thou didſt make a will in his name, and didſt name an Executor for him, yet this will is void in law [m]. For as thy ſoul is not my ſoul, ſo thy will is not my will, nor thy Teſtament my Teſtament [n].

[l] L. captatorias. C. de teſt. mil.

[m] Bar. in L. quidam. ff. de reb. dub. n. 7. Bald. in L. Executorem. C. de excep. rei jud. n. 5. Jo. And. Gem. (qui nihil ignoravit) & Franc. in c. ſi part. de teſta. 6. Pariſ. conſil. 38. vol. 3. n. 60. & infr. part. 4. § 11. [n] Bald. & Angel. in L. captator. C. de mil. teſt. Pariſ. con. 38. n. 40.

Furthermore, by force of theſe words, *of our will*, the (35) Teſtament being termed a *ſentence*, differeth from thoſe other ſentences which are not of will: that is to ſay, from that ſentence which is the ſaying of ſome grave man; for that is not a ſentence of will, but of reaſon [o]: and from the ſentence of a Judge; for that is not a ſentence of will, but of juſtice [p]. And howſoever the Teſtator may declare his ſentence, that is to ſay, his Teſtament, as he will [q]: yet the Judge may not pronounce his ſentence as he will [r]; but he muſt judge according to that which is alledged and proved †, (although peradventure as a private man he know the ſame to be untrue,) ſaving in certain caſes [t], which, becauſe they are impertinent to this diſcourſe, are not here to be handled.

[o] Paul. de caſtr. in d. L. j. d. teſta. ff.

[p] Paul. de caſtr. & Lancel. dec. in d. L. j. de teſta.

[q] In teſtamentis ſtat pro ratione voluntas. Mantic. de conject. ult. vol. l. 6. tit. 14. n. 2.

[r] Inſtit. tit. de offic. Jud. in princ.

† L. Illicitus. § veritas. ff. de offic. præſidis.

[t] Tu, ſi placeat, videas Jo. Olden. æquiſ. juris interp. Coriſ. l. 3. Miſcel. 20. Covar. lib. 1. var. reſolut. c. 1. Gentil. Diſputat. vj. & generaliter Legiſtas in d. L. Illicitus. & Canoniſtas in c. j. de offic. ord. extr.

It

It followeth in the definition, *touching that which we would have done after our death.* By which words a Teſtament differeth from all other ſentences proceeding from our will, and from whatſoever actions which take their effect in the life-time of the Teſtator [v]. For (36) a Teſtament reſpecteth that which is to be performed after the death of the Teſtator: and therefore ſo long as he liveth, the Teſtament is of no force; but doth take his ſtrength and is confirmed by the Teſtator's death [x]. By theſe words alſo we may collect the materiall and the finall cauſe of every Teſtament. Which thing becauſe I have more amply inlarged hereafter, let this ſuffice, which hath been ſpoken, for a taſte onely of ſuch fruit as grow in this Garden.

[v] Paul. de caſtr. in d. L. j. de teſta. ff. Minſing. in tit. de teſta. ordin. Inſtit. Cova. in Rub. de teſta. extr. part. j.

[x] L. 4. de Adim. leg. ff. c. Matthæ. de celeb. miſſ. extr.

§ IV. The definition of a laſt Will.

1. *What a laſt Will is.*
2. *Wherein the definition of a laſt will doth agree or differ, with or from, the definition of a Teſtament.*
3. *Of the difference betwixt theſe two words*, Lawfull *and* Juſt.
4. *Of the difference betwixt theſe two words*, Diſpoſition *and* Sentence.

A Laſt Will is thus defined; (1) *Ultima voluntas eſt legitima diſpoſitio de eo quod quis poſt mortem fieri velit* [a]. A laſt Will is a lawfull diſpoſing of that which any would have done after death. This (2) definition differeth not from the definition of a Teſtament, ſaving in two words; that is to ſay, in ſtead of *juſta ſententia*, a juſt ſentence, which is in the definition of a Teſtament, here is *legitima diſpoſitio*, a lawfull diſpoſing [b]. Now if we ſhall conſider the difference betwixt theſe words, *juſta ſententia*, and *legitima diſpoſitio*, then ſhall we underſtand the full difference betwixt a laſt Will and a Teſtament, (either being underſtood according to this definition:) for in the reſt both the definitions do agree; and that which hath been or may be ſaid of the one, may alſo be verified of the other.

[a] Franciſ. Mantica de conject. ult. vol. lib. 1. tit. 4. num. 18.

[b] Supr. § 2. & § 3.

Lawfull (3) and *juſt* do thus differ: this word *lawfull* hath not all the ſignifications which be included in the word *juſt*. For albeit by this word *lawfull* is excluded whatſoever is wicked, or whatſoever is contrary to Juſtice, Piety, or Equity, or contrary to good and wholſome manners, as well as by the word *juſt* [c]: and although the word *lawfull* may alſo ſignify ſolemn, or furniſhed with ſuch due rites as Law requireth [d], as well as the word *juſt* doth: albeit alſo that the word *lawfull* in ſome ſenſe do ſignify perfect [*], that is to ſay, not wanting any thing which the Teſtator meant to utter [f]: Yet it doth not ſignify perfect in ſuch an excellent or ſpeciall ſenſe as doth the word *juſt* [g]; that is to ſay, having ſuch perfection as is requiſite for the form of a Teſtament, and is proper thereunto; namely, the appointing of an Executor, by the which form a Teſtament differeth from all other laſt Wils, of what kind ſoever they be [h].

[c] Spiegel. Lexic. verb. legitimum.

[d] Gloſſ. in c. conſanguinei. de ſen. & re jud. extr.

[*] L. Certo. § ult. de ſerv. ruſt. præd. verb. legitima latitudo.

[f] Supra § 3. n 9.

[g] Mantic. de conject. ult. vol. l. 1 tit. 4. n. 10.

[h] Supra § 3. n. 19.

This word (4) *diſpoſitio* is ſometimes taken for a quality of the mind, or unperfect habit, that is to ſay, an inclination or affection [i]. In this place it doth ſignify an act proceeding from a firm purpoſe or reſolution [k], like as the word ſentence in the former definition [l]. And albeit this word *ſentence* ſeem to inſinuate a greater heed, or a more diſcreet conſideration to be taken in the diſpoſing of that we would have done after our death, then the nature of this word *diſpoſition* doth inforce: yet no laſt Will is of any force *ſine animo diſponendi*, no more then is the Teſtament *ſine animo teſtandi* [m].

[i] Jo. Caſus Oxon. tractat. dialect. ij. part. c. 20, 21.
[k] Mantic. de conject. ult. vol. lib. 1. tit. 4.
[l] Supra § 3. n. 20.
[m] Vide infra part. 1. § 13.

§ V. The definition of a Codicill.

1. *This word Codicill ſignifieth a little Book.*
2. *A Codicill rightly defined.*
3. *How the definition of a Codicill doth agree with the definition of a Teſtament, or differ from it.*
4. *The ſignification of the word* juſt *in this definition of a Codicill.*
5. *A Teſtament is called a great Will, and a Codicill a little Will.*
6. *A Teſtament and a Codicill compared to a Ship and a Boat.*
7. *Of the invention of Codicils.*
8. *Codicils may be made in writing, or without writing.*
9. *Codicils may be made, either by him which hath made a Teſtament, or which dieth inteſtate.*
10. *Who muſt pay the Legacies given in a Codicill by him which dieth inteſtate.*
11. *Codicils be reputed part of the Teſtament, whether they be made after, or before the Teſtament.*
12. *Codicils and Teſtaments do agree in the efficient cauſe; but they have contrary effects.*

[a] Codicillus à Codice. Codex rurſus dicitur à caudice, ſiquidem codex ſignificat contextum tabularũ quæ priſcis temporibus aptabantur cera ad uſus. Olden. de actio. claſſ. quint. in princ. Spiegel. Lexic. verb. codicil.

Codicillus, a Codicil, is a diminutive of *Codex* [a], a Book. And ſo this (1) word *Codicil*, being rather Latine then Engliſh, doth ſignify a little Book or writing [b]. The reaſon wherefore it is ſo called, doth ſtraightways appear.

[b] Gloſſ. in Rub. inſt. de codicil.

[c] Sic enim à pleriſque definitur, ut ſit ultima voluntas minus ſolennis abſque hæredis inſtitutione. Quæ definitio vix arridet, ut qua vix intelligam qui differat codicillus à legato, quum & iſtud videatur voluntas ultima abſque hæredis inſtitutione, nec magis ſolennis, nec minus perfecta, quam eſt codicillus. Paulus de caſtr. in L. j. de teſt. ff. Covar. in Rub. de teſt. ext. par. j. n. 3. [d] Mantic. de conject. ult. vol. lib. 1. tit. 8. * Supra § 2.

A Codicil is diverſly defined of divers. In my opinion (2) is it rightly defined after this manner [c]: *Codicillus eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri velit, abſque Executoris conſtitutione* [d]. A Codicill is a juſt ſentence of our will, touching that which any would have done after their death, without the appointing of an Executor. Which definition (3) doth agree almoſt word for word with the definition of a Teſtament: ſaving that ſome words are here expreſſed which are there omitted *, *abſque Executoris conſtitutione*,

with-

without the appointment of an Executor. By force of which words the Codicill is made to differ from a Teſtament: for a Teſtament can no more conſiſt or be without an Executor, then a Codicill can admit an Executor [e]. By the (4) ſame words alſo is reſtrained that ſpeciall ſignification of the word *juſt*, which in the definition of a Teſtament importeth that ſingular perfection and proper form whereby a Teſtament differeth from all other kinds of Wils [h]. For here this word *juſt* is not onely deſtitute of that peculiar ſenſe; but it doth not ſo much as ſignify ſolemn, or furniſhed with Teſtamentary rites or formalities [i]. For a Codicill is an unſolemn laſt Will [k]. So that by the word *juſt* in this definition is excluded that which is unlawfull, and that perfection onely included which may ſtand with the nature of a Codicill [l]. Whereupon (5) the Writers conferring a Teſtament and a Codicill together, and perceiving the odds betwixt the one and the other, they call a Teſtament a great Will, and a Codicill a little Will [m]. And do (6) compare the Teſtament to a Ship, and the Codicill to a Boat [n], tied moſt commonly to the Ship. And not unfitly: as well becauſe the Codicill is not able to ſuſtain the heavy burthen of an Executor, who, repreſenting the perſon of the Teſtator [o], doth as it were (like *Atlas*, who is feigned to carry the world upon his ſhoulders) bear upon his back the whole maſs and weight of all the goods and chattels which did belong to the deceaſed [p], and on whoſe neck are laid all the Actions, which either might be intended againſt the Teſtator by others, or againſt others by the Teſtator [q]: as alſo becauſe the Codicill, being (as I have ſaid) an *unſolemn laſt Will*, can no more contain all thoſe Solemnities, Ceremonies and Formalities which the Civill Law doth exact in a Teſtament [r], then a little Boat is able to ſupport the tall Maſts, broad Sails, the great ſtore of the huge and weighty Tackle and Furniture belonging to a great Ship, with the burthen whereof the Boat muſt needs ſink and periſh †. And indeed when (7) Codicils were firſt invented, they were uſed very ſparingly [t], that is to ſay, in ſtead of a Teſtament, when the Teſtator had not opportunity to make a Teſtament, by reaſon of the manifold ſolemnities thereof [v]; which were remitted in a Codicill [x]: or elſe as additions to the Teſtament made, whenas any thing was omitted in ſuch a Teſtament, which the Teſtator would adde; or ſomething put in, which the Teſtator, upon better advice, would detract. Which emendation of the Teſtament was always done by way of Codicill [y]. And this was that reaſon (whereof I ſpoke before) wherefore this kind of laſt Will was termed a Codicill [z]; that is to ſay, a little Book or a little writing.

[e] Intellige, directo, nam oblique ſeu per fideicommiſſum hæreditas codicillis jure relinquitur. § Codicillus. inſtit. de Codicil. Adde Vaſq. de ſucceſſ creat. lib. 3. § 25. Ubi regula extat Ampliationibus octo, & ſex Limitat. ornata.

[h] De qua ſupr. § 3. n. 19.

[i] Minſing. Inſtit. de Codicil.

[k] Graſſ. Theſaur. com. op. § Codicil. in prin.

[l] De cujus vocabuli ſignificatione, ſupr. § 4. n. 3.

[m] Accurſ. & alii in Rub. de codicil. Inſtit. Sichard. in Rub. de Codicil. C.

[n] DD. maxime Sichr. in Rub. de Codicil. C. in princ.

[o] Sichard. in Rub. de jure delib. C. n. 3. Minſin. in Rub. de hæred. inſtituend. Inſtitut. Do. & Stud. li. 2. c. 11.

[p] L. Hæreditas. de reg. jur. ff. & ibi Cagnol. Plowden in caſu inter Greisbrooke & Fox, & latius infra part. 6. § 3.

[q] Inſtit. de perpetuis & temp. actio. *Terms of Law*, verb. execut. & infra part. 6. § 3.

[r] Olden. de action. claſſ. 5. in princ.

† Adverte tamen, quod iſta ſimilitudo procedit intuitu juris tantum civilis; quia jure quo in hoc regno utimur, non magis onerantur teſtantes quam codicillantes ſolennitatum obſervatione.

[t] Nempe ut condimenti, non ut cibi, fuit olim codicillorum uſus. Olden. ubi ſupr.

[v] L. Codicillorum. § codicilli. ff. de codicil. Inſtit. eod. tit. in prin.

[x] § Ult. inſtit. de cod.

[y] L. conficiuntur in prin. de jure codicil. Cujacius in tit. de codicil. C.

Concerning (8) the divers kinds of Codicils, although it be denied by ſome, that there be ſuch two kinds of Codicils as there is of

[z] Vaſq. de ſucceſſ. crea. l. 3. § 35. n. 27. Graſſ. Theſaur. com. op. § codicil. n. 10.

Teſtaments, *viz.* written and nuncupative [z]: yet it is granted of the more part, that a Codicill may be made either in writing or without writing [b].

[b] Gloſſ. in Rub. de codicil. C. Minſing. in Rub. de codicil. Inſtit. Weſenb. in tit. de jure codicil. ff. quamvis abuſive dici codicillos oporteat conditos ſine ſcriptis, quum codicillus ſit parvula ſcriptura.

[c] L. conficiuntur. in prin. ff. de jure Codicil. § non tantum. inſtit. de codicil.

Moreover it is granted of all, that a (9) Codicill may be made either by him which dieth inteſtate, or by him which dieth with a Teſtament [c].

[d] L. ab inteſtat. ff. de codicill. § non tantum. Inſtit. de codi. Brook Abrid. tit. deviſe, n. 35.

If the (10) Codicill be made by that perſon which dieth inteſtate, the Legacies therein given muſt be payed by him that ſhall have the adminiſtration of the goods of the deceaſed, as if he were Executor [d]. Inſomuch that if the Codicill were made long before the death of the party now deceaſed, who after the making of the Codicill did beget a child, to whom the Adminiſtration of the goods is committed, (whether he were born during his father's life, or after his father's death;) he ſhall be charged with the payment of the Legacies, as if he had been born when the Codicill was made *.

* D. L. ab inteſtat. L. ſi quis. § ſed etſi. L. gravi. L. is qu. ff. de jure codicil. Minſing. in D. § non tantum. Jaſ. Sichard. & alii in L. j. C. de codicillis.

[f] L. conficiuntur. ff. de codicil. de Cod.
[g] Vigel. Method. jur. civil. part. 4. lib. 5. c. 23. in prin.
[h] Minſing. poſt. gloſſ. in d. § Non tantum. inſtit. de codicil.

If the (11) Codicill be made by him which hath a Teſtament; then whether the ſame were made before or after the Teſtament [f], it is reputed for part and parcell of the teſtament [g], and is to be performed as well as the teſtament: unleſs being made before the Teſtament, it appear to be revoked in the Teſtament, or be contrary to that which is contained in the Teſtament [h].

[i] Roland. B. non. de arte Notari. ubi refert 4 caſus, in quibus convenit codicillus cum teſtamento part. 2. c. 8. fol. 561.
[k] In lib. quem appellant, Flores ultimarum voluntatum, octo numerantur differentiæ inter codicillos & teſtamenta, quarum tamen pars maxima jam eſt extincta. [l] Bar. & alii in L. 2. de leg. 1. j. Graſſ. Theſaur. com. op. § codicil. n. 2 qui affirmat hoc procedere non ſolum prohibente jure, ſed etiam prohibente ſtatuto teſtar.

Codicils (12) and Teſtaments do both agree in the efficient cauſe, (as they do in divers other things [i]:) Yet nevertheleſs they have many contrary effects [k]. They agree in the efficient cauſe, becauſe every perſon which may make a Teſtament, may alſo make a Codicill; and whoſoever cannot make a Teſtament, the ſame perſon cannot make a Codicill [l].

[m] § poſteriore. Inſtit. Quib. mod. teſta. infir.
[n] L. cum proponat. C. de codicil.
[o] L. ultim & ibi DD. de Edict. divi Adria. toll. C.
[p] Gloſſ. & DD. in d. L. cum proponat. Graſſ. Theſaur. com. op. § codicillus. ubi atteſtatur hanc op. eſſe com.

They have divers contrary effects. For firſt, whereas no man can die with two Teſtaments, (becauſe the latter doth always infringe the former [m]:) yet a man may die with divers Codicils, and the latter doth not hinder the former, ſo long as they be not contrary [n]. Another contrary effect is this. If two Teſtaments be found, and it do not appear which was the former or latter, both Teſtaments are void [o]. But if two Codicils be found, and it cannot be known which was firſt or laſt, and one and the ſame thing is given to one perſon in one Codicill, and to another perſon in another Codicill: the Codicils are not void, but the perſons therein named ought to divide that thing betwixt them [p].

Finally,

Finally, it is to be noted, that there be divers words which are common, or indifferent either to make a Codicill or a Teſtament. In which caſe whether the Judge is to pronounce for a Codicill or a Teſtament, is hereafter diſcuſſed [q].

[q] Inf. parte 4. § 5.

§ VI. The definition of a Legacy.

1. *What is a Legacy.*
2. *Four things to be conſidered in this definition.*
3. *Every Legacy proceedeth of the liberality of the Teſtator.*
4. *How a Legacy differeth from a gift in regard of death, or from other gifts.*
5. *Not lawfull for the Legatary to take his Legacy by his own ſole authority.*
6. *Legacies payable as well by the Adminiſtrator as by the Executor.*
7. *Divers kinds of Legacies in times paſt.*
8. *The diſtinction of Legacies confounded.*

A *Legacy* (otherwiſe termed of our Common Lawyers a *Deviſe* [a]) is (1) a gift left by the deceaſed, to be paid or performed by the Executor or Adminiſtrator [b]. There be other definitions of a Legacy, which I do willingly omit, becauſe this one is ſufficient [c]. Wherein (2) four things eſpecially are to be noted.

[a] Terms of Law, verb. Deviſe.

[b] § j. Inſtit de lega.

[c] Conſtat plures eſſe Legati definitiones, aliam Florentini, aliam Modeſtini, aliam Juſtiniani, quarum nulla eſt quam unus aut alter non tentavit quidem ſudarunt omnes; quippe quorum fractis argumentis nullam harum non per ſe juſtam, legitimeque traditam, clariſſime oſtendit D Gentilis Oxonienſ. hodie Legiſtarum decus, lib 1. Lection. & Epiſtol. c. 14, 15, 16.

Firſt, in that it is called a gift, it argueth that it (3) proceedeth of the mere liberality and free good will of the dead man; and conſequently, that he is not of neceſſity tied thereunto [d].

[d] Minſing. in d. tit. de legat. inſtit. § j.

Secondly, in that it is *left*, it (4) differeth from other gifts; not onely thoſe which are called Deeds of gift, effected and executed in the life-time of the Donor; but alſo from thoſe *gifts which be made in conſideration of death*, wherein the things given are delivered by the Teſtator in his life-time, to become their own to whom they are delivered in caſe the Teſtator die *. For Legacies are not delivered by the Teſtator, but are to be paid by his Executor, or Adminiſtrator [f].

* § j. Inſtit. de Donat

[f] L. j. Quorum lega. ff. L. non dubium, de lega. C. & ibi DD. Perkins tit. teſta. c. 7. fol. 94. b.

And thirdly, becauſe the Legacy is to be paid by the Executor or Adminiſtrator, (as appeareth by the definition) it is noted, (5) that it is not lawfull for the Legatary, to take his Legacy by his own ſole authority [g]. (Onely the Executor may of his own authority enter to the goods and chattels of the deceaſed [h].) Otherwiſe if the Legatary preſume to be his own carver, and do enter to the poſſeſſion of the thing bequeathed, without delivery or conſent of the Executor, he thereby loſeth his Legacy [i]: except in certain caſes, whereof hereafter [k].

[g] D. L. non dubium. & Sichar. ibid. n. 2. D. Coſens Apologie of Eccleſiaſtical proceedings, c. 2. f. 23.

[h] Infra 6. § j. & iij.

[i] D. L. non dubium. C. de lega.

[k] Infra part. 7. § 12. in fine.

Fourth-

Fourthly, in that here is mention as well of the Adminiſtrator as of the Executor, the meaning is, that (6) not onely thoſe Legacies are due, which are left in a Teſtament wherein is appointed an Executor, and where the party doth not die inteſtate; but thoſe Legacies alſo which are left in a Codicill or laſt Will, wherein no Executor is appointed, and where the party dieth inteſtate [l]: which Legacies as they be due, ſo are they payable in both caſes; in the one by the Executor, and in the other caſe by the Adminiſtrator [m]. Nay more then this; if any Legacy be left in a Teſtament, although the Executor therein named cannot be Executor, or do refuſe the Executorſhip, and ſo the party die in a manner inteſtate, and thereupon adminiſtration of his goods is granted, according to the Satutes of this Realm [n]: in this caſe alſo, by the Laws and Cuſtoms of this Realm, the Legacies be due and payable by the Adminiſtrator [o], though it be otherwiſe by the Civill Law [p].

[l] § non autem. Inſtit. de Codicil.

[m] Eod. § non autem. & L. ab inteſtat. ff. de jure codicil.

[n] Stat. H. 8. an. 21. c. 5.

[o] Brook Abridg. tit. teſta. n. 20. inf. part. 7. § 19.

[p] L. j. in fin. de Injuſt. teſtam. L. fideicommiſ. de Leg. j. Imperator. de Leg. 2. ff. Graſſ. Theſaur. com. op. § legatum. q. 8.

In ancient time (7) there were four ſeverall kinds of Legacies: *Per vindicationem* [q], *per damnationem* [r], *per ſinendi modum* †, *per præceptionem* [t]. That is to ſay, by challenge, by condemnation, by ſuffering, by foretaking. Being ſo diſtinguiſhed, by occaſion of a certain ſolemnity or formality of words aſſigned to every kind of Legacy [v]; with ſeveral actions or remedies aſcribed to every ſuch Legacy, for the recovery thereof [x]. But afterwards the (8) Laws being more favourable to dead mens Wils, this preciſe ſolemnity of words was taken away, and liberty granted to make bequeſts by any manner of words [y]. (As elſewhere more fully [z].) Whereby in the end all Legacies became of one and the ſame nature, and are all at this preſent recoverable by like actions [a]. Which by the Civill Law is threefold [b]. With us, if the Executor detain the Legacy, or do ſlack the performance of the Teſtator's will, the Legatary muſt ſue the Executor in the Eccleſiaſticall Court, for the ſame Legacy ſo detained or not ſatisfied [c]. For farther confirmation hereof, I have ſet down *verbatim* that which I find written by that learned and no leſs religious man Doctour [d] *Coſen*, (as I take it,) in that worthy work, intituled, *An Apology for ſundry proceedings by Juriſdiction Eccleſiaſticall, part.* 1. *cap.* 3. whoſe words are theſe: An Executor may ſue another in a Spirituall Court touching his Teſtator's goods, in this caſe; *viz.* If a man deviſe or bequeath

[q] § ſed olim. inſtit. de lega.

[r] Alii legunt per vendicationem, ut Porcius, & Minſing. in d. § ſed olim.

† i.e. obligationem, vel condemnationem.

[t] i.e. antecaptionem. Minſing. in d. § ſed olim.

[v] Accipe ſingulorum legatorum exempla. 1. Titius rem illam habeto. 2. Hæres meus damnas eſto dare. 3. Hæres meus ſinito Titium rem illam ſumere, ſibique habere. 4. Hæres prædium illud præcipito. gloſſ. in d. § ſed olim.

[x] Legato videlicet per vindicationem relicto, actio realis; per damnationem vero, perſonalis naſcebatur. Sinendi modo relictum, ſola legatarii autoritate ſine vitio capitur: legatum per præceptionem actione familiæ herciſcundæ exigebatur. Minſing. & alii in d. § ſed olim. [y] L. j. C. com. de lega. § noſtra Inſtit. de lega. [z] Infra part. 4. § 4. [a] D. § noſtra. Inſtit. de lega. [b] Jure civili tres actiones Legatariis competere dignoſcitur, perſonalem, realem, hypothecariam. Jure autem quo nos utimur, quin prima actio, qua executor ex quaſi contractu teneatur, etiamnum vigeat, nulla eſt dubitatio. Secunda etiam, qua rem Legatam perſequimur, competit quidem legatario primo adverſus executorem, ſeu adminiſtratorem, pro re tradenda; deinde, adepta poſſeſſione, adverſus quemlibet poſſeſſorem conceditur actio tranſgreſſionis. Tertiæ vero actioni, qua res teſtatoris legatariis pignorari dicitur, ſuſpicor nullum in hoc regno locum eſſe relictum. [c] Tract. de repub. Angl. lib. 3. c. 9. Bract. de legib. & conſ. Angl. lib. 3. c. 26. in fin. Brook Abridg tit. Deviſe, n. 27. 45. Fitzherb. Nat. Brev. fol. 42. & 50. in Br. de conſultac. in princ. Plowden in caſ. inter *Paramor* & *Yardley. Termes of Law*, verb. Deviſe. [d] *D. Coſen's Apology of Eccleſiaſticall proceedings* parte prima, c. 3. pag. 23.

Corn

Corn growing or goods unto one, and a ſtranger will not ſuffer the Executor to perform the Teſtament; for this Legacy he ſhall ſue the ſtranger for it in a Spirituall Court [d]. But if a man take from the Executor goods bequeathed, for this the Executor muſt uſe his Action of treſpaſſe, and not ſue in the Spirituall Court: for Executors cannot ſue for the goods of their Teſtator in a Court Eccleſiaſticall, but at the Common Law *. Alſo tenants may be ſued but at the Common Law by Executors or Adminiſtrators for rent behind, and due to the Teſtator in his life-time, or at the time of his death; and they may for the ſame diſtrain the land charged with the rent †. If a Teſtament bear date at *Caen* in *Normandy* [f], and be proved in *England*, the Executor may upon ſuch Teſtament have action.

But if an *Engliſh* man being in *Flanders* makes his will there, and therein deviſe, *omnia bona ſua*, &c. though by the Law there by the name *de bonis* all his lands are comprehended, yet by the Law of this Nation they ſhall not paſs *.

Of Legacies or Deviſes it will be ſufficient to touch a few points. In the Books of the Common Law it is ſet down, that they ſhall be recovered in a Spirituall Court, and not in a Court Temporall [g]. Therefore if a Termor of certain Land bequeath his crop, and die, the Spirituall Court ſhall hold plea thereof [h]. Likewiſe where one ſued in Court Chriſtian for goods deviſed by Teſtament, which another claimed by deed of gift, and thereupon brought a prohibition, and ſhewed the deed of gift, and alledged withall, that the Defendant was neither Executor nor Adminiſtrator: yet becauſe it was by name of a Legacy, it was adjudged to belong to the Spirituall Court, by which it was to be determined, and the circumſtances to be tried, whether the Deviſe were good or not [i]. And in reſpect a man hath ſuch Action againſt the Executor for Legacy before the Eccleſiaſticall Judge, therefore the Legatary or Deviſee may not of his own head take the goods or chattels, deviſed to himſelf, out of the poſſeſſion of the Executor [k]. And for this alſo eſpecially, becauſe the Law doth not bind that the Legacies ſhall be aſſigned, paid, or delivered, untill the debts of the Teſtator be ſatisfied and paid [l]. But becauſe a Francktenement or Inheritance deviſed is not demandable in an Eccleſiaſticall Court, but in the Temporall [m]; therefore the Legatary, (according to the Deviſe) without farther aſſignment or delivery, may enter into them after the death of the Teſtator [n].

If a man by his Teſtament do bequeath goods to the fabrick of a Church, for this Legacy the Executors may be ſued in Court Eccleſiaſticall. Alſo if Wardſhip or chattels reall * (as a Leaſe) be bequeathed by Will, a man may ſue for them in Court Eccleſiaſticall [o]; but not ſo for Lands deviſed. If a Teſtator by his Teſtament doth charge his Executor to pay his debts, the Creditors (in reſpect of ſuch charge) may ſue for them in the Court Eccleſiaſticall [p]. When a man, being Executor or Legatary, (and ſo enjoined by Will,) doth refuſe to collate or erect a Grammar-School, and is therefore ſued in a Court Eccleſiaſtical; if he purchaſe a Prohibition, the other party ſhall have a Conſultation [q].

[d] T. 4 H. 3. referente Fitzh. tit. prohib.

* Stat. 2 R. c. 3. 17.

† 32 H. 8. c. 37.

[f] T. 18 Ed. 2. teſta. 6.

* M. 39 Eliz. *Johnſon's* Caſe.

[g] 37 H. 6. p. 9.

[h] H. 8 H. 3. ex Fitzh. tit. prohib. 19.

[i] 46 Ed. 3. fol. 32.

[k] M. 20 E. 4. 9.

[l] T. 2 H. 6. 15.

[m] Bracton l. 5. c. 16.

[n] Perkins tit. Deviſes, § 576, 577. Inſt. part. 1. fol. 3.

* Reg. in br. orig. p. 48. 6.

[o] *Liberties of the Clergy by the Laws of the Realm*, by John Gooddal, *Printed by* Robert Wyer, tempore Hen. 8. Brownl. rep. part. 1. fol. 34.

[p] Ibidem.

[q] Ibidem.

But if a man deviſeth that his Executors ſhall ſell his Land, and out of the money which ſhall be raiſed by ſale, giveth a portion to his Daughters; it was adjudged that neither the land nor money was Teſtamentary, for it is not aſſets to ſatisfy debts, but a ſumme ariſing of Land, and appointed to ſpecial uſes in way of equity, and not as a legacy, and therefore not to be ſued for in the Eccleſiaſticall Court, but in a Court of Equity: and the Eccleſiaſticall Court cannot hold plea of a legacy in equity, but where it is a legacy in Law indeed *. Yet if it be a man's perſonall legacy, though it be to be raiſed out of the profits of Land, it being but a leaſe for years, and the party hath raiſed it, and died before payment, no action being maintainable for it at Common Law by account againſt the Executors; it is reaſon there ſhould be remedy in the Eccleſiaſticall Court: and ſo it was adjudged in *Love*'s Caſe, and a Conſultation awarded †. Vide Cro. part 1. fol. 395. H. 10 Car. B. R. *Hetter* verſ. *Percivall Brett*.

* T. 17 Jac. C.B. rot. 895. *Edwards* verſ. *Graves*. Hob. rep. fol. 265. Dyer f. 151, 152. M. 29 & 30 Eliz. C. B. *Germie's Caſe*.

† P. 9 Jac. B. R. *Love* verſ. *Hapleſden*. Cro. part. 2. fol. 279. 9 Eliz. Dy. 264.

§ VII. The definition of a gift in conſideration or becauſe of death.

1. *What is a gift in conſideration of death.*
2. *Three ſorts of gifts in conſideration of death.*
3. *Which of theſe three gifts is compared to a Legacy.*

A *Gift in conſideration of death* is, (1) where a man, moved with the conſideration of his mortality, doth give and deliver ſomething to another, to be his, in caſe the Giver die; or otherwiſe if he live, he to have it again [a]. Of (2) *Gifts* in caſe of death there be three ſorts [b]. One, when the giver, not terrified with fear of any preſent perill, but moved with a generall conſideration of man's mortality, giveth any thing [c]. Another, when the giver, being moved with imminent danger, doth ſo give, that ſtraightwaies it is made his to whom it is given [d]. The third is, when any being in perill of death, doth give ſomething, but not ſo that it ſhall preſently be his that received it, but in caſe the giver do die *. This (3) laſt kind of gift is that which is compared to a Legacy [f]. But the other two are reputed ſimple gifts, if the giver do not make expreſs mention of his death; and ſo they cannot be revoked [g], but take full effect from the time of the making of the gift, if the ſame be not fraudulent [h]. Nevertheleſſe, if a man deliver unto thee certain goods to be kept untill he be dead, and then to be diſpoſed or diſtributed *in pios uſus*; in this caſe thou art Executor of thoſe goods ſo to be diſtributed [i].

[a] Inſtit. de donac. in princ.

[b] L. 2. ff. de donac. mor. cauſ.

[c] D. L. 2. L. Seni. L. ubi ita. ff. de mor. cau. don.

[d] D. L. 2.

* Ibidem.

[f] Bar. in d. L. ſeni. Graſſ. Theſaur. com. op. § donatio q. 1.

[g] Jul. Clar. § donatio. q. 4.

[h] Stat. Eliz. an 13. c. 5. & an. 14 c. 11.

[i] Lib qui inſcribitur Abridgment des caſes, Incerto Authore, Edit. 1599. f 157. n. 7.

§ VIII.

§ VIII. The diviſion of Teſtaments.

1. *Of the ancient diviſion of Teſtaments.*
2. *Another threefold diviſion.*

FOraſmuch as that (1) ancient diviſion of Teſtaments, whereby they were firſt diſtributed into two ſorts [a], the one Teſtament being termed *Calatis Comitiis* [b], the other *Procinctum* [c], (whereunto afterwards a third kind was added, called *Per æs & libram* [d],) hath been long ſince aboliſhed *, and worn not onely out of faſhion, but almoſt out of memory; inſomuch that unto ſome their very names may ſeem very ſtrange: Unwilling therefore to offer any thing more tedious then profitable, I thought good to make report of ſome other kinds of Teſtaments, whereof haply we may have ſome uſe in *England*.

[a] Inſtit. de teſta. ordin. § 1.

[b] i. e. Vocatis comitiis, ſeu vocato populo, à Græco Verbo καλέω, quod eſt voco. Tempore namque pacis, bis tantum in anno Teſtator, convocato per cornicinem populo, eoque præſente, ac quaſi teſte, ultimam ſuam voluntatem declarare ſolebat. Minſing. in d. § j.

[c] Hoc teſtamentum fieri conſuevit ab exituris in prælium, ob dubiam belli aleam. Inde procinctum dicitur, non quod ſuccincte fieret, ſed quod procincti dicuntur milites, quaſi præcincti & expediti. Viglius in d. § j.

[d] i. e. per imaginariam venditionem; præſentibus enim teſtibus una cum libripende ſeu æſtimatore patrimonii, is qui ſucceſſor defuncti futurus erat, morituri bona emebat, deinde percutiens libram, illud æris quaſi pretium dabat ei à quo hæreditatem expectabat. Minſing. poſt. Vigl. in d. § j.

[e] Text. in d. § 1.

Underſtand therefore, that (2) of Teſtaments ſome be *ſolemn*, ſome *unſolemn*; ſome *written*, ſome *unwritten*, or *nuncupative* [f]; ſome *priviledged*, and ſome *not priviledged* [g].

[f] Jure Civili Teſtament. ſcriptum non videtur alia ſpecies à Teſtamento ſolenni, plerunque enim hæc duo confunduntur, & indifferenter ſeu promiſcue uſurpantur. (Bar. in L. Tabular. ff. Quemad. teſtament. app. & apertius Minſing. in § ſed cum. Inſtit. de teſta. ord. & in § fin. ibid. Graſſ. Theſaur. com. op. § teſta. q. 10. n. 1.) At vero jure quo nos utimur inſpecto, plane diverſa ſunt. Sæpius etenim neceſſarium eſt, ut Teſtamenta noſtra ſint ſcripta, ſed ut ſint ſolennia nunquam. Quinimo vel eod. jure Civili teſtamentum inſolenne dividitur in ſcriptum & non ſcriptum. Graſſ. Theſaur. com. op. § teſta. q. 10. & q. 11. n. 3.

[g] Mantic. de conject. ult. vol. l. 1. tit. 7. Adde Jul. Clar. § teſtam. q. 3. ubi tradit nobis aliam teſtamentorum diviſionem.

§ IX. Of ſolemn Teſtaments.

1. *What is a ſolemn Teſtament.*
2. *No uſe of ſolemn Teſtaments here in* England.
3. *The rigour of the Civill Law concerning Teſtaments.*
4. *This rigour juſtly reformed.*
5. *What moved* Juſtinian *to exact the number of ſeven witneſſes in Teſtaments.*
6. *Two or three witneſſes ſufficient by the Law of God.*

SOlemn *Teſtaments* are they, (1) wherein be all thoſe ſolemnities of the Civill Law: as the preſence of ſeven witneſſes, and required thereunto, their ſubſcription, their ſubſignation, the expedition of the act at one time, *&c* [a]. But (2) of this kind of Teſtaments we have no uſe in *England* [b]. Wherefore it ſhall ſuffice, that I have ſhewed (as it were onely by the pointing of the finger) that ſuch a kind of Teſta-

[a] § Sed cum paulatim. Inſtit. de teſta. ordin. L. Hac conſultiſſima. C. de teſta.

[b] Supra § 5. n. 1. Sir *Tho. Smith* de rep. Angl. lib. 3. c. 7. Bract. lib. 2. c. 25.

ment there is mentioned in the Civill Law; to the (3) obſervation whereof the *Roman* people were ſtrictly tied in the making of their Teſtaments, (much like as were the *Jews* to their Jewiſh Ceremonies:) ſo that if any one of theſe ſolemnities were omitted, the Teſtament was void [c]. Which thing was not onely hard to be performed, but in ſome reſpects alſo ungodly. For that it was not ſufficient for any man, to prove a Teſtament by two or three witneſſes, (the Law of God requireth no mo [d],) but it muſt be proved forſooth by ſeven witneſſes *. Wherefore with (4) good reaſon was this exceſſe reformed, firſt by the Eccleſiaſticall Law, which did reduce the number of ſeven witneſſes to three, (the Parochiall Miniſter being one [f],) and in ſome caſes two [g]; and then by the generall cuſtome of this Realm, which diſtinctly requireth no mo witneſſes then two, ſo they be free from any juſt cauſe of exception [h]. The reaſon (5) wherewith *Juſtinian* was moved to approve of theſe ſolemnities, and to adde thereunto as he did, was, as he doth frankly acknowledge, (*Propter teſtamentorum ſinceritatem, ut nulla fraus adhibeatur* [i],) For the ſincerity of Teſtaments, and that no fraud ſhould be practiſed. And I doubt not but before he did ſet down ſo preciſe a Law, he had ſufficient triall of great cunning and craft practiſed in the making and proving of Teſtaments; (I would there were none in *England*;) which urged him to go from that rule (6) and Law of *Ulpian* the famous Lawyer, the ſame alſo being moſt agreeable to the Law of God. *Ubi numerus teſtium non adjicitur, etiam duo ſufficiunt; pluralis enim elocutio duorum numero contenta eſt* [k]. *Where the number of witneſſes is not expreſſed, even two are ſufficient; for the plurall ſpeech is content with two.* Where he ſaith, the plurall ſpeech is content with two, which is the reaſon of the Law, it hath this ſenſe; It was a thing very well known, that *one witneſſe* alone was not ſufficient to decide a controverſie, (the teſtimony of one being as the teſtimony of none [l];) and therefore there were required *witneſſes*: but how many witneſſes were ſufficient, was doubted of. Whereupon *Ulpian* anſwereth, that albeit witneſſes are required, yet that plurall ſpeech, *witneſſes*, is ſatisfied with two, and ſo two witneſſes are ſufficient, where a greater number is not required [m].

[c] L. 1. Injuſt. rupt. & irrit. teſt. ff. Minſing. in d. § ſed cum. n. 12.

[d] Deut. c. 19. Matth. c. 18. Mantic. de conject. ult. vol. l. 6. tit. 3. n. 18.

* D. § ſed cum paulatim.

[f] C. cum eſſes. de teſta. extr.

[g] Teſta. videlicet ad pias cauſas condit. c. relatum. el. j. de teſta. extr.

[h] Lindw. c. ſtatut. de teſta. l. 3. provincial. conſtitu. verb. probatis. Peckius in c. privilegium. de reg. jur. l. 6. n. 7.

[i] D. § ſed cum paulatim. Inſt. de teſta. ord.

[k] L. ubi de teſtibus. ff.

[l] C. licet. c. venient. &c. Jusjurand. de teſtibus extr. admonere. 33. q. 2.

[m] DD. in d. L. ubi.

§ X. Of unſolemn Teſtaments, and whether the aforeſaid definition of a Teſtament do agree to our Teſtaments in *England*.

1. *What is an unſolemn Teſtament.*
2. *Of the freedom we enjoy in* England *in making our Teſtaments.*
3. *Writing required in the deviſe of Lands.*
4. *Many things permitted which be not neceſſary.*
5. *Whether it be needfull that witneſſes be required in a Teſtament.*
6. *Whether our Teſtaments in* England *do agree with the former definition of a Teſtament.*

7. *Some*

7. *Some reaſons whereby it ſhould ſeem that the former definition and our Teſtaments do not agree.*
8. *The former definition of a Teſtament doth comprehend both ſolemn and unſolemn Teſtaments.*
9. *The reaſons which prove that this foreſaid definition doth comprehend both Teſtaments.*
10. Ulpian *did flouriſh before* Juſtinian.
11. *The increaſe or decreaſe of Solemnities do not make the Teſtament to ſwerve from the former definition.*
12. *An unſolemn Marriage is a true Marriage in reſpect of the knot or eſſence of Matrimony.*
13. *A Military Teſtament, though unſolemn, is properly a Teſtament.*
14. *A Teſtament amongſt children is properly a Teſtament, though unſolemn.*
15. *A great inconvenience if an unſolemn Teſtament were not properly a Teſtament.*
16. *What is a Teſtament properly ſo called?*
17. *In* England *our Teſtaments, though unſolemn, have the effect of Teſtaments properly ſo called.*
18. *An anſwer to thoſe reaſons which ſeem to prove our Teſtaments do not agree with the former definition.*
19. *The former definition is not of any ſpeciall Teſtament.*
20. *The concluſion.*

UNſolemn Teſtaments are (1) ſo termed, whereas the ſolemnities of the Civill Law above mentioned, or any of them, are omitted, at the making of the Teſtament [a]: without the which, by the Civill Law, the Teſtaments were void [b], except in certain caſes. But (2) with us in *England* they are not void: for that our Teſtaments are not ſubject to the Ceremonies of the Civill Law, but are made with all liberty and freedome, and (as one reporteth) *Jure militari* [c]. And ſo we are no farther tied then to the obſervation of thoſe requiſites that be neceſſary *Jure gentium* [d]. Which requireth but two witneſſes *: ſaving that in (3) a Legacy or Deviſe of Land writing is alſo neceſſary, and that to be made in the life of the Teſtator [e]. Howbeit, it is not to be doubted but that a man may make his Teſtament in writing, wherein he diſpoſeth of his goods onely, and ſo he may uſe the teſtimony of no witneſſes then two. Alſo (4) if he will, he may procure the witneſſes to ſubſcribe their names to the Teſtament, yea, to every page of the Teſtament, (if there be divers;) and it is a good and a ſafe courſe, whereby many forgeries might be prevented, or more eaſily detected. But no (5) man is tied to the obſervation of theſe cautels [g], (except as before) no not ſo much as to require the

[a] L. j. de injuſt. rupt. & irrit. teſta. ff.
[b] D. L. j. L. Hac conſultiſſima. § ex imperfect. C. de teſta. Minſing. in § ſed cum paulatim. Inſtit. de teſta. ord. n. 12.
[c] D. *Smith* tract. de Repub. Ang. lib. 3. c. 7. Quod tamen indiſtincte non admitterem, quandoquidem multa privilegia teſtamentis militaribus competere videantur, qualia ſunt, cum duobus teſtamentis decedere, & id genus alia, (de quibus infra § 14.) quæ noſtratibus non licea

vendicare, (ut eod. § 14.) Et contra, Rogatio teſtium, quæ pro ſolennitate in militari teſt. requiritur, (communi interpretum calculo,) ab Anglis teſtantibus non ita neceſſario obſervatur. [d] Milites ad ſolennitates tantum juris gentium aſtringi videre eſt apud Dec. in L. milites. C. de teſta. mil. poſt. Bar. in L. j. C. de ſacroſanct. Eccleſ. & DD. in L. j. ff. de mil. teſta. Quibus adde Tiraquel. de privileg. piæ cauſæ, c. 3. * Dec. in d. L. Milites. Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 9. in fin. [e] Stat. H. 8. anno 32. c. 1. [g] Lindw. c. in ſtatutum de teſta. l. 3. provincial. conſtit. Cant. verb. probat.

witneſſes [h]; ſo beneficiall are the Laws of this Realm to the ſubjects of the ſame.

[h] Ratio eſt, quia rogatio teſtium non eſt juris gentium aut divini. Ab. Covar. & alii in c. relatum. el. j. de teſta. extr. Tiraquel. de privilegiis piæ cauſæ, c. 3. quo poſito, conſtat, Anglos pleniore libertate frui in condendis Teſtamentis, quam quæ vel ipſis militibus indulta fuit à jure civili: quo (ſi communi ſit credendum opinioni) rogatio teſtium eſt neceſſaria. Jul. Clar. § teſtim. q. 58. Quamvis non deſint qui contendunt rogationem hujuſmodi non ad ſolennitatem exigi, ſed ut ex eo facilius dijudicari poſſit, Milites, proferendo verba quæ ſonant in teſtim. ea deliberate & ſerio, animoque teſtandi, non joco, non perfunctorie protuliſſe, ut ſæpe ſolent alias. Tiraquel. de privil. piæ cauſæ, c. 3. Weſenb. conſil. 38. n. 55. Adde quod in Teſtamento inter liberos, ubi attenditur ſolennitas juris gentium, non eſt neceſſarium ut teſtes ſint rogati. Graſſ. Theſaur. com. op. § teſtim. q. 12. Clar. § teſtim. q. 18. Dec. conſil. 610. Denique, nec in teſto. ad pias cauſas (in cujus confectionem adhibendæ ſunt juris gentium ſolennitates) requiritur ut teſtes ſint rogati, ut habet com. op. teſte Covar. in c. relatum. el. j. de teſta. infr. § 16.

But (6) here methinks a queſtion doth offer it ſelf to be reſolved. If all our Teſtaments in *England* be *unſolemn*, and (7) if by the Civill Law regularly all unſolemn Teſtaments be void, inſomuch that if but one onely ſolemnity be omitted, the Teſtament is no Teſtament [i]; how doth the definition of a Teſtament above mentioned, borrowed out of the Civill Law, agree with our Teſtaments here in *England*, being all unſolemn Teſtaments? It ſhould ſeem we had need to ſeek a new definition, and that I have erred, together with other our Common and Temporall Lawyers of this Realm, in borrowing that definition, which agreeth ſo juſt with their Teſtaments, with which Teſtaments our Teſtaments do not agree. For if the definition did agree with both Teſtaments, they ſhould agree betwixt themſelves; but the Teſtaments do not agree betwixt themſelves; and therefore the definition doth agree but with one alone. If it agree but with the one, and we confeſs it doth agree with their Teſtaments, how then can it agree with ours alſo?

[i] L. j. de injuſt. rup. & irrit. teſta. ff. L. ex imperfect. L. ſi unus. de teſta. C.

To this queſtion briefly my opinion is this, that the (8) definition doth comprehend both *ſolemn* and *unſolemn Teſtaments*; and therefore is agreeable to our Teſtaments. The antecedent I prove (9) thus. The Definition (as appeareth) was made by *Ulpian* [k]: this *Ulpianus* (10) is one of thoſe ancient Lawyers, whoſe Anſwers, Definitions, Rules and Concluſions are contained in the Digeſts, and who flouriſhed no leſs then two hundred years before *Juſtinian* [m]: which *Juſtinian* did adde certain other ſolemnities, without the which he ordained that the Teſtament ſhould be void [n]. It muſt be granted therefore, that the definition being perfect before thoſe new ſolemnities were deviſed, and agreeable to thoſe Teſtaments which had not theſe ſolemnities, becauſe as yet they were not: ſo now the ſame ſolemnities being taken away, the definition comprehendeth thoſe Teſtaments which have them not at this preſent, as it did thoſe other Teſtaments which had them not at the beginning [o]. So that the (11) increaſing or decreaſing of the number of ſolemnities maketh not the Teſtament to come nearer, or depart farther from the definition [p].

[k] Ulp. in L. j. de teſta. ff.

[m] Juſtinianus adeptus fuit Imperium an. Chriſti nati 527. Ulpianus autem floruit longe ante, nimirum tempore Alex. Severi Imp. Ro. paulo plus CC annis poſt Chriſtum natum. Gagnol. in L. unic. ſi quis jus dicenti. ff.

[n] § Sed cum paulatim. verb. ſed his. Inſtit. de teſta. ordin. L. jubem. L. cum antiquitas. C. de teſta. 16. lib. 3. n. 15. Everard. loc. à contrariis.

[o] Eadem enim ratio oppoſiti in oppoſito, ac propoſiti in propoſito. Socin. conſil.

tion [p]. Indeed the preſence or abſence of Solemnities make the Teſtament ſolemn or unſolemn; but they do not make it a Teſtament or no Teſtament [q]. For (12) as an unſolemn Marriage is not therefore no Marriage becauſe it is unſolemn, (the banes perhaps not being publiſhed, or the Marriage not being celebrated in the face of the Church, but privately in a Chamber, or ſome other rite or ceremony thereof being omitted,) but is nevertheleſs reputed for a true Marriage [r], (ſo that the ſame were ſolemnized by a Miniſter in the preſence of a ſufficient number of Perſons thereunto required, by whoſe teſtimony the ſame might be proved; in which caſe the ſaid Marriage may be ſaid to be celebrated in the face of the Church, though neither in Church nor Chappell, but in a chamber, none being ſeriouſly or purpoſely excluded *;) both in the Eccleſiaſticall Court, in reſpect of the knot or eſſence of matrimonies †, and in Temporall Courts, in reſpect of the Wife's Dower, and other Legall effects [t]; at leaſt if the parties married be licenſed or diſpenſed with by the Ordinary in that behalf [x]; ſo that there be no other lawful impediment, as of conſanguinity or affinity within the Leviticall Degrees prohibited, precontract, or ſuch like, but the defect of ſolemnity onely ‖: Even ſo an unſolemn Teſtament doth ſtill remain a Teſtament, when theſe Solemnities do rather appertain to the proof or appearance, then to the ſubſtance or Teſtament [y]. For it is not ſaid in the definition, there muſt be this or that number of ſolemnities in the Teſtament; onely it is requiſite that there be a juſt number [z], that is to ſay, ſo many as the Law requireth: and if the Law require none, the definition requireth none, more then is ſufficient for a due proof [y].

[p] Nam differentia quæ eſt tantum ſecundum majus & minus, non conſtituit diverſas ſpecies, & ſic nec diverſas definitiones. L. fin. de fund. Inſtruct. legat. ff. Olden. de culpa.

[q] Si enim equus cæcus ſit equus; ita ut cæcitas non faciat equum non eſſe equũ, ſed non eſſe oculatum: à fortiori, teſtamenti inſolennitas non facit teſtam. non eſſe teſtamentum, ſed non eſſe ſolenne: à fortiori, inquam, quum cæcitas ſit defectus in jure naturæ, inſolennitas autem defectus juris tantum civilis.

[r] Nam illa requiſita de quibus in c. cum inhibitio. de clan. deſponſ. ext. non eſſe de forma & ſubſtantia matrimonii vel legitimationis prolis, ſed de ſolennitate tantum, & ad ipſius decorem introducta, poſt Theolog. & Canoniſtas prodidit Graniſ. conſil civil. 168. & hanc op. communi calculo receptam dicit Jo. Lub. & Maſcard. de probat. verb. filius, conclu. 798. n. 8. Et licet hodie per concil. Tridentin. hujuſmodi matrimonia fiant irrita; nos tamen ſequimur antiquum jus comm. tanquam non mutatum. Stat. H. 8. an. 25. c. 19. Nec illud, c. 30. q. 5. c. 1. de cland. deſponſ. extr. * Maſcard. Tract. de probat. conclu. 1035. ubi locupleti teſtimonio conſtat, matrimonium in facie Eccleſiæ poſſe contrahi dici, convocatis amicis, nemine videlicet ſeriòſe excluſo, etiamſi non ſervetur forma. In ca. Cum inhibitio. de cland. deſpon. exam. præſcripr. Et hanc opinionem & veram & moribus receptam eſſe ibid. liquido conſtat. † Abb. in c. 1. de clan. deſponſ. extr. Dec. conſil. 163. Covar. de ſponſal. ſecunda part. c. 6. in principio, n. 7. Lindw. in c. Humana. de cland. deſp. lib. 4. provincial. conſtitut. Cant. [t] Perk. tit Dower. fol. ſexageſimo prim. quod verum eſt jure hodierno. Licet olim regnante H. 3. & longe ante eum contrarium jus obtinuit. Fitz. Nat. Bre. f. 150. * Fitz. Nat. Bre. fol. 150. ‖ Maſcard. ubi ſupra. Socin. jur. conſil. 87. n. 65. vol. 4. Palſior. de noth. & ſpur. cap. 5. n. 7. & cap. 10. n. 1. [x] Minſing. in d. § Sed cum paulatim. Old. de Act. claſſ. 5. in prin. Ripa in L. Nemo. de leg. 3. & Jo. Cror. in eand. L. col. 6. Quorum opinione hæ ſolennitates teſtamentariæ non ad ſubſtantiam, ſed ad probat. teſti. pertinent: quæ quidem opinio ſine difficultate procedit hic in Anglia, ubi iſtiuſmodi ſolennitates omnino non ſunt neceſſariæ; licet fortaſſe alias contraria tanquam communis opinio locum ſibi vendicaret. Bar. in d. L. Nemo. Covar. in c. cum eſſes. de teſta. extr. n. 8. [z] Juſta ſententia. [y] Bon. in c. cum eſſes. de teſta. extr. in fin. Soarez l. rec. ſenten. verb. teſta. n. 72. Jaſ. in L. cunctos. de ſumma tri. C. n. 39.

If an unſolemn Teſtament were no Teſtament, then *Teſtamentum militare* were no Teſtament; for it is an unſolemn Teſtament [z]: And yet *Teſtamentum* (13) *militare* is both in name and nature a Teſtament [a]. Likewiſe if an unſolemn Teſtament were no Teſtament, then *Teſtamentum inter liberos* were no Teſtament, being unſolemn and unperfect [b]: But *Teſtamentum* (14) *inter liberos*, though

[z] Weſenb. in tit. de teſta. mil. ff. Bald. in L. filii. C. famil. herciſcun. n. 55.

[a] Tit. de teſta. mil. ff. Inſtit. &c. Vaſquius de ſucceſſ. crea. §. 21. n. 47.

[b] L. Hac conſultiſſima. § ex imperfecto. C. de teſta.

unſo-

unſolemn, even properly, and by the Civill Law, is a Teſtament [c]. Beſides this, (15) if an unſolemn Teſtament were no Teſtament, then all the Teſtaments here in *England* being unſolemn, we ſhould all die inteſtate [d]: and dying inteſtate, then (mark what an inconvenience would follow) by the Statutes of this Realm, the adminiſtration of the goods of every man dying inteſtate ought to be committed to the Widow or next of Kin to the deceaſed. But the contrary hath been generally obſerved, that is to ſay, where an Executor hath been appointed, able and willing to undertake the Executorſhip, there the maker of this Will hath been adjudged not to have died inteſtate; and ſo the adminiſtration of his goods hath not been committed to the Widow, or next of Kin, according to the Statute, although the Teſtament were unſolemn: which adminiſtration otherwiſe ought to have been committed according to the ſaid Statute, as is aforeſaid *. And therefore by common obſervation alſo an unſolemn Teſtament is not no Teſtament; but rather even properly a Teſtament. For by the (16) opinion of the moſt and beſt Writers, that is concluded to be properly a Teſtament, the Authour whereof cannot be ſaid to be inteſtate, and whoſe Executor therein named is to ſucceed *ex Teſtamento* [f]; though it be but in reſpect of the Laws or cuſtomes of the place where the Teſtament is made, being contented with fewer ſolemnities then are requiſite in other places [g]. Which (17) effect our unſolemn Teſtaments have, wherein an able and willing Executor is named. For neither he is reputed to die inteſtate, which appointeth ſuch an Executor [h], but is plainly, even in Laws of ſtrict interpretation, (I mean the Statutes of this Realm,) termed a Teſtator [i]: neither is the adminiſtration of his goods committed to the Widow or next of Kin, by the authority of the Ordinary, according to the Statute, as in caſe of one dying inteſtate [k]. But the Executor deriving his authority from the Teſtator onely, doth ſucceed in the place of the dead man by force of the Teſtament, according to the Teſtator's meaning and diſpoſition [l]. Wherefore an unſolemn Teſtament is even properly a Teſtament. Which concluſion being true, the definition is not more proper to the one then to the other.

[c] Graſſ. Theſaur. com. op. § teſtam. q. 11. n. 2. ubi refert hanc op. eſſe com. ex Alex. Dec. Curtio Nat. Emanuele Coſta, Vaſquio, & aliis, cont. gloſſ. in d. § ex imperfecto.

[d] Inſtit. de hæred. quæ ab inteſtat. in princ.

* Id quod levi obſervar. fieri ubique conſpicitur.

[f] Bald. in L. cunctos de ſumma trinitate. C. n. 17. Sichard. in L. Hac conſultiſſima. § ex imperfecto. C. de teſta. n 5. infin. Graſſ. Theſaur. com. op. § teſta. q. 11. n. 2. Jul. Clar. § teſtam. q. 13. Everard. conſil. 185. n. 8.

[g] Andr. Gail lib. 2. practic. obſervat. 123. Soarez lib. recep. ſenten. verb. teſtm. n. 72. Baptiſt. Villabol. lib. com. op. verb. teſtm. n. 57. Gabr. Rom. lib. 4. tit. de teſta. conc. 4. Vaſq. de ſucceſſ. crea. § 21. n. 47, 48. Pariſ. conſil. 12. n. 45. vol. 3. quorum opinio eſt proculdubio communis, licet aliter ſentiat gloſſ. in d. § ex impe. fecto.

[h] Hoc nemo neſcit qui vel mediocriter in alterutro foro verſatur.

[i] Stat. Ed. 3. an. 4. c. 7. & an. 25. c. 5. ſtat. H. 8. an. 21. c. 5. & aliis pene infinitis locis.

[k] Id quod non ſemel dictum eſt, ſed & ſæpius eſt dicendum.

[l] Plowden in caſu inter Greisbrook & Fox, fol. 280. his verbis: Lez executores noſmes ſount executores maynetenant & devant probate del teſtament: Car le probate neſt que confirmation & allowance de ceo que le teſtator fiſt, &c. Et ils poyent executer devant probate, &c.

Now for the anſwering of the arguments objected. Firſt, where (18) it is objected, that all unſolemn Teſtaments are void, although one onely ſolemnity were omitted; that is true onely by the Civil Law. But it doth not therefore follow, that an unſolemn Teſtament is no Teſtament in reſpect of this definition [m], howſoever it have not the ſame effect to all intents in law. But if it be therefore a Teſtament, becauſe it takes effect in law, then are all our Teſtaments (though unſo-

[m] Vaſq. de ſucceſſ. crea. § 21. n. 48.

unſolemn) good and ſufficient Teſtaments; becauſe they have as much force without thoſe ſolemnities, as if they had them all and an hundred more [n]. Secondly, where it is objected, that the definition doth agree to their Teſtaments, and that their Teſtaments and ours do not agree betwixt themſelves; I anſwer, that the (19) definition is not of any ſpeciall Teſtament, that is to ſay, it is not of a ſolemn Teſtament alone, nor of an unſolemn Teſtament alone, nor of a written Teſtament alone, nor of a nuncupative Teſtament alone, nor is convertible with any ſpeciall kind of Teſtament mentioned in any part of the Civill Law, from the which our Teſtaments made in *England* do differ. For indeed, if the definition were made of any ſpeciall Teſtament alone, mentioned in the Law, from the which our Teſtaments do differ; then could not our Teſtaments, differing from the Teſtament defined, agree with the definition [o]. But the definition is of a Teſtament which is alſo common to all thoſe, or any other kind of Teſtaments, as well ſolemn as unſolemn, as appeareth before: and therefore the Teſtament ſo defined, although it be ſpeciall in reſpect of the definition, yet is it generall in reſpect of the ſeverall kinds of Teſtaments above recited [p], and is verified of every of them, ſolemn or unſolemn; and ſo conſequently is common as well to our Teſtaments as to theirs, diſtributing both name and nature to every ſpeciall Teſtament [q], howſoever they differ amongſt themſelves [r]. To (20) conclude therefore, we need not to ſeek any new definition, but rather they themſelves, by reaſon of their new ſolemnities, deviſed ſince the making of the old definition.

[n] Soarez. lib. recep. ſen. verb. teſta. n. 72. Graſſ. d. § teſtm. q. 11. Clar. § teſtm. q. 13. And. Gail l. 1. pract. obſer. c. 123. Vaſq. de ſucceſſ. crea. § 21. n. 47. Sichard. in L. Hac conſultiſſ. § ex imperfecto. C. de teſta.

[o] Quod enim differt à definito, differt à definitione: ut, quod non eſt homo, non eſt animal rationale. Everard. & Olden. loco à definitione. Jo. Caſus Oxon. tract. de dialect. f. 225.

[p] Teſtm. ſuperius definitum genus eſt ſubalternum. Id quod poteſt eſſe & ſpecies & genus, diverſo tamen reſpectu: nimirum ſpecies reſpectu ſuperioris, id eſt, ſententiæ; genus reſpectu inferioris, id eſt, paganici, & militaris; ſcripti, & nuncupativi; ſolemnis, & inſolemnis teſtamenti. Hujuſmodi autem teſtamenta differunt non numero, ſed ſpecie; & ſic teſtamentum, cujus ſupra eſt definitio poſita, genus eſt, quia prædicatur de pluribus differentibus ſpecie. [q] Id quod eſt generi proprium. Olden. Topic. Legal. Loco à genere. [r] Species namque per formam diſcrepat à ſpecie. Conveniunt autem omnes ſpecies in ſuo genere. Olden. & Everard. ubi ſupra.

Indeed we have not theſe ſolemn Teſtaments of the Civill Law; but in that reſpect we are the more happy, and our law the more godly †.

† Alciat. in L. j. C. de ſacroſanct. Eccleſ. n. 12.

§ XI. Of a written Teſtament.

1. *What is a written Teſtament.*
2. *A Teſtament nuncupative is not made a written Teſtament by after writing, except in certain caſes.*
3. *Some things common both to a written and to a nuncupative Teſtament.*
4. *Some things peculiar to a written Teſtament.*
5. *Deviſe of Lands, Tenements, or Hereditaments, is not good without writing.*

6. *In a written Teſtament it is not neceſſary that the witneſſes be privy to the contents.*
7. *Cauſes wherefore Teſtators many times would have their Wills ſecret.*
8. *In what manner the Teſtament is to be made when the Witneſſes know not the contents.*
9. *The Witneſſes muſt be learned, and muſt write their names on the Teſtament, when they do not know the contents thereof.*

A *Written* [a] *Teſtament* is (1) that Teſtament which at the time of the making thereof is committed to writing [b]. By which words, *at the time of the making thereof*, are excluded (2) ſuch Teſtaments as are afterwards put in writing. For being made firſt by word of mouth, they do ſtill remain nuncupative, notwithſtanding the reducing thereof into writing [c]. Unleſſe the Teſtament being firſt made by word, and afterward (in the life-time of the Teſtator) being written, it were brought to the Teſtator, and by him approved for his Teſtament: or unleſſe the Teſtator, when he declared his Teſtament, did will that the ſame ſhould be written, and that thereupon the ſame was written accordingly during his life: for then it is as effectual for the deviſe of Lands, Tenements, and Hereditaments, as if it had been written at the firſt [d]. Inſomuch that if the Writer, being skilfull in the Law, do onely take notes from the mouth of the deceaſed of his laſt Will, for the deviſe of Lands, Tenements and Hereditaments, and afterwards write the ſame, but before it be ſhewed to the Teſtator, he depart this life; yet this is ſufficient for a Will in writing, for the conveyance of Lands, Tenements and Hereditaments *, whereof ſuch notes were taken. And ſo it ſeems when Notes or Articles be made, and read to the Teſtator by the Notary, though the ſame be not written up at large, or in form of Law, untill the Teſtator be dead †.

[a] Teſtamentum in ſcriptis an ſit alia ſpecies à teſta. ſolenni, examinavi ſupra § 8. in margine.
[b] Minſing. in § ſed cum paulatim. Inſtit. de teſta. ordin.
[c] Minſing. in § fin. Inſtit. de teſta. ord.
[d] Dyer fol. 72. & ita ſæpe audivi à nonnullis hujus regni Angliæ juriſperitis.
* Et hanc opinionem tenuiſſe Curiam de Banco refert Do. Dyer ſummus Juſticiarius in caſu inter Sackvill & Browne.
† Dyer ubi ſup. ſuper ultimam voluntatem cujuſdam Hanton civitatis London.

A written (3) Teſtament albeit it have ſome things thereunto belonging which alſo belong to a nuncupative Teſtament, and ſo common to both, as the appointing of an Executor, (without the which there can be no Teſtament at all, neither written nor nuncupative,) and as the deviſing or diſpoſing of goods or chattels, (which may be done indifferently either by word or by writing;) yet (4) there be ſome things which be proper and peculiar to a written Teſtament. One is the (5) deviſe or grant of Lands, Tenements, and Hereditaments; which cannot paſs by a nuncupative Teſtament, or Will without writing [e]. Nevertheleſs it ſeemeth that in the Deviſe or bequeath of Lands and Tenements holden in Burgage tenure, and ſuch as were deviſable before the Statute of *Hen.* 8. *An.* 32. it is not neceſſary that the ſame ſhould be written, but that ſuch Lands, Tenements and Hereditaments may paſs ſufficiently by Will nuncupative, or Deviſe without writing. And that the ſaid Statute of *H.* 8. *An.* 32. *cap.* 1. which doth require writing in the Deviſe or bequeſt of Lands, Tene-

[e] Stat. H. 8. an. 32. c. 1.

Tenements and Hereditaments, without which writing the Deviſe is not good in Law, is to be underſtood to take place in thoſe caſes onely, in the Deviſe of ſuch Lands as could not paſſe by the deceaſed's Will, before the making of the ſaid Statute; whereby men were enabled to deviſe their Lands, Tenements and Hereditaments, by their laſt Wills, ſo that the ſame were written in their life-time †. As doth afterwards more fully appear: where is alſo ſhewed, what Lands and how much may be deviſed by Will [h]. Another thing peculiar to a written Teſtament is this: In a written Teſtament (6) the Teſtator hath this benefit, he may conceal and keep ſecret the tenour or contents of his Will from the witneſſes [i]; which he cannot doe when he maketh a nuncupative Teſtament. And therefore, if the Teſtator be loth to have his Will known; which thing hapneth very often, (7) either becauſe the Teſtator is afraid to offend ſuch perſons as do gape for greater bequeſts then either they have deſerved, or the Teſtator is willing to beſtow upon them; (leſt they, peradventure, underſtanding thereof, would not ſuffer him to live in quiet:) or elſe becauſe he ſhould overmuch encourage others, to whom he meant to be more beneficiall then they expected; (and ſo give them occaſion to be more negligent Husbands or Stewards about their own affairs, then otherwiſe they would have been, if they had not expected ſuch a benefit at the Teſtator's hands:) or for ſome other conſiderations: In theſe and like caſes, after the Teſtator hath written his Will with his own hand, or procured ſome other to write the ſame, he may cloſe up the writing, without making the witneſſes privy to the contents thereof; and ſhewing the ſame to the witneſſes, he may ſay unto them, *This is my laſt Will and Teſtament*, or, *Herein is contained my laſt Will:* and this is ſufficient [k]. Neither is the Teſtament therefore the leſſe available, becauſe the witneſſes do not know what is contained in the ſame [l], in caſe (8) the witneſſes be able to prove the Identity of the writing; that is to ſay, that the writing now ſhewed, is the very ſame writing which the Teſtator in his life-time affirmed before them to be his Will, or to contain his Will [m]. Otherwiſe the Will can take no effect, through the defect of ſufficient proof [n]. And therefore (9) leſt the Will ſhould periſh for want of due proof, when the Teſtator would not have the contents known, it is not onely requiſite that the witneſſes be learned, but expedient alſo that they write their names on the back-ſide, or ſome part of the Teſtament [o], or uſe ſome other like means, that they may be able to depoſe and teſtify undoubtedly, that the ſame is the very writing it ſelf which the Teſtator affirmed to be his Will, or to contain his Will [p]. If the Teſtator affirm that his Will is already written, and that it is in the cuſtody of ſuch a one, naming ſome ſingular perſon, which perſon ſo named doth bring forth a writing, and doth depoſe by virtue of his oath, that this is that Will or writing which the Teſtator affirmed unto him to be his

† Hanc opinionem crebriori calculo recepram eſſe, & in foris obſervaram ſæpiſſime accepi à nonnullis doctiſſ. Conſidicis, quorum peritiam ſatis approbatam cognovi.

[h] Infra 3. part. § 4.

[i] L. Hac conſultiſ. C. de teſta. & gloſſ. ibid.

[k] Auth. Et non obſervato. C. de teſta. & DD. ibidem.

[l] Minſing. in § ſed cum paulatim Inſtit. de teſta. ord. Cui accedit Kling. in eund. tit. n. 8. Vide Simo. de Prætis De interpret. ult. vol. l. 1. f. 31.

[m] DD. in d. L. Hac conſultiſſ. & in Auth. Et non obſervato. C. de teſta. Covar. in c. cum tibi de teſta. ext. n. 5. & inſ. part. 4. § 25.

[n] Bar. & alii in L. ſi ita ſcripſero. ff. de cond. & demon. Pariſ. conſ. 19. vol. 3. n. 25, 26.

[o] Specul. de Inſtr. ed. § compendioſe. n. 40. Kling. in tit de teſta. ordin. Inſtit. n. 8. & 9. Clar. § teſta. q. 4. n. 3.

[p] Sichard. in Auth. quod ſine. C. de teſta. Covar. in c. cum tibi de teſta. extr. Specul. ubi ſupra, & inſr. part. 4. § 25. Clar. d. § Teſta mentum, q. 4. & q. 36. in fin. Maſcard. Tract. de probac. concluſ. 1352. n. 173. Pariſ. d. conſil. 19. vol. 3. n. 25 26, &c.

laſt Will and Teſtament: this man's teſtimony, together with the other witneſſes *, depoſing that the Teſtator affirmed unto them, that his Will was in that man's keeping, is a ſufficient proof of the Will of the deceaſed, albeit none of them were privy to the contents thereof, ſaving the Teſtator alone. But if the Teſtator did not ſimply affirm, that his Teſtament was in that man's keeping, but alſo that it was written with his own hand; then it is not ſufficient for the proof thereof, that this man, who doth produce the Will, depoſe, that it be the ſame which the Teſtator did commit to his cuſtody, unleſſe alſo it appear that the ſame was written with the Teſtator's own hand †. For the Teſtator, in affirming that the Teſtament was written with his own hand, doth intimate thus much, that unleſſe it appear to be written with his hand, that other man's teſtimony ſhall not ſuffice ‖, as in the former caſe: otherwiſe the mention of his own hand-writing had been idle †.

* Ludo. Zunt. Reſponſ. pro uxore, n. 88. Alex. Concil. 176. l. 5.

† Caſtro. in leg. hæredes palam. ff. de Teſta. & in § per nuncupationem. L. hac conſultiſſima. Cod. de teſta. Ludo. Zunt. ubi ſup. n. 89. Hiero. Pantſchman. q. 2. n. 53.

‖ Caſtrenſ. & in alii ubi ſup. † Verba teſtatoris intelligi debent ut non ſint ſuperflua, imo improprie ſunt accipienda potius quam ſuperflue. Mantic. de conject. ult. vol. lib. 3. tit. 9. n. 1.

Whether a Teſtament may be written with notes or figures, and whether it may be proved without witneſſes, by the hand and ſeal of the Teſtator, with other like queſtions, is declared afterward q.

q Infra part. 4. § 25.

What ſhall be ſaid to be a good Will to paſs Lands and Tenements within the Stat. 32 H. 8.

TWO things are requiſite to the perfection of a Will by which Lands paſſe. 1. Writing, that's the *initium*: 2. the death of the Deviſor, that's the conſummation. The *initium* ought to be *plenum & perfectum*, otherwiſe it's not good: and therefore if one command another to make his Will, and by that to deviſe *White-acre* to J. S. and his heirs, and *Black-acre* to J. H. and his heirs, and he writ the deviſe to J. S. in the life-time of the Deviſor, and before the other is writ the Deviſor dieth; yet this is a good Will to J. S. But if he command one to make his Will, and to deviſe *White-acre* to J. S. and his heirs, upon condition, and he writ the deviſe to J. S. and his heirs, and before that he hath writ the condition the Deviſor dieth; the deviſe is void: for in the one caſe the deviſes are ſeverall and diſtinct, and in that caſe the deviſe to J. S. is full and perfect; but in the laſt the deviſe is not full, but imperfect; for the entire deviſe as to J. S. was not fully put in writing, ſo as the *initium* in that caſe *non fuit plenum* a. Therefore if a man intend Land to J. S. for life, the remainder to J. D. and before the remainder is written, the Deviſor dieth, it's a void deviſe for the whole Land; becauſe the one did depend upon the other. T. 11 Jac. C. B. Sir *Tho. Lake*'s Caſe.

a 20 Eliz. *Calthorps* Caſe. Curia Ward. lib. 3. fol. 31. *Butler* and *Bakers* Caſe. Brownl. rep. part. 1. fol. 44.

So if a man ſeiſed in Fee of Lands by his Will declared, that he intended to advance his 2 daughters equally, and deviſeth the one moiety by ſpeciall name of the Land to his eldeſt daughter, and dies before

he

he has deviſed the other moiety to his younger daughter; adjudged that the deviſe was void for the whole; becauſe he did intend to advance them equally. T. 11 Jac. *in Curia Wardorum* Sir *Tho. Lakes* & Madam *Cæſar*.

Any ſuch inſtructions to have his Will made in writing, thereby to give his land to one of his ſons for life, and the Clark which put the Will in writing, writes an eſtate in Fee: *per Curiam* the Will is void in the whole; becauſe it was not the Will of the Deviſor [b]. If a man by parol deviſeth land to J. S. and his heirs, and afterwards it is put in writing during his life without his command or agreement, it's no Will in writing within the 32 H. 8 [c].

But if a man write the Will of another without directions, and bring it to the Deviſor, and he allow of it, it's a good will [d].

A. B. ſeiſed of Lands in Socage deviſed the ſame by parol to his 3 ſiſters, a ſtranger preſent recited the Teſtator's words to him, who affirmed the ſame; afterwards the ſtranger for his own remembrance put the words into writing; but read them not to the deviſor before his death: this deviſe ſo reduced into writing *modo & forma* is void; becauſe it was written without the direction of the Deviſor; and conſequently no Will within the Statute. But if after the writing thereof, he had read the ſame to the Deviſor, and thereupon the Deviſor had affirmed the ſame, it had been a good Will *.

J. G. being an illiterate man commanded one to write his Will, by which he would that his houſe, 40 acres of Land and 52 acres of Paſture ſhould be ſold by his Executors: the party writ his Will in theſe words; I will that my houſe with the appurtenances ſhall be ſold by my Executors, and the money diſtributed for the advancement of my young children: the Deviſor dieth, the Executors ſell part of the Land: adjudged, by this deviſe the Lands did paſs, for the words *cum pertinentiis* are effectuall to enforce the deviſe [f].

A. deviſeth Land to R. his ſon and the heirs male of his body, with remainder over to his other children, R. died in the life-time of the Deviſor, having iſſue male, A. the Teſtator ſaith that my Will and intent is, that my Will ſhall ſtand good to the children of R. as if he had ſurvived me. By *Popham* and *Fenner*, the children ſhall take by this deviſe. *Gawdy* and *Clench Contra*: and their reaſon was, becauſe the laſt publication was not in writing. The other Juſtices did think there was enough before in writing to make the iſſues have the Land: but there they were to take by diſcent, whereas here they are to take by purchaſe [g]. *Quære.*

A man took notes of one who lay ſick, to make his Will, and afterwards he drew up the Will in writing, but the ſick perſon died before it was ſhewed to him: *per Curiam* it's a good Will within the Statute of 32. to paſſe Lands [h]. So it was adjudged in *Hinton*'s Caſe, where articles were read to the Deviſor concerning the diſpoſition of his Lands, and the articles were written and engroſſed after his death, and yet it was a good Will within the Statute [i].

[b] T. 36 Eliz. rot. 817. M. 36. & 37. rot. 817. *Downhall* verſ. *Cateſby*. Moores rep. fol. 356. & 483.

[c] M. 3 Jac. *Moſeley* verſ. *Blaſhington*.

[d] P. 3 Jac. Camera Stellat. *Combs* Caſe. Moores rep. fol. 759. n. 1051.

* P. 30 Eliz. B. R. *Naſh* & *Edwards* Caſ. Leon. 113. vide P. 24 Eliz. B. R. Leon. part. 3. fol. 79. Leon. 113.

[f] 27, 28 Eliz. *Higham* verſ. *Honiwood*. Moores rep. fol. 221. Leon. fol. 34. Pl. Com. 210.

[g] H. 36 Eliz. rot. 546. *Fuller* verſ. *Fuller*. Moores rep. fol. 353. n. 476. Crok. part. 3. 422.

[h] T. 6 E. 6. Dyer f. 72. 5 Eliz. *Sackvils* Caſe.

[i] 5 Eliz. *Hintons* Caſ. Anderſ. rep. c. 85.

M. 4 & 5 Ph. & Mar. *Brown* & *Browns* Caſe.

A man made his will in writing in this manner, I will and bequeath my Lands to A. and the name of the Deviſor was not in the whole Will, yet adjudged a good deviſe by averment of the name of the Deviſor [k].

[k] P. 24 Eliz. B. R. Leon. part. 3. fol. 79.

The Lord *Audley* made a feoffment in Fee of his Lands, and afterwards by Indenture reciting the feoffment to be to the intent that the Feoffees ſhould perform his Will, he declared in theſe words, Know ye, that my Will is, that they ſhall ſtand ſeiſed for the payment of my debts, and afterwards ſhall make an eſtate to me and E. my wife in tail: *per Curiam*, it's no Will, becauſe he limited the eſtate to be executed in his life-time. It was farther holden, that the wife was a ſtranger to the Land, and to the ancient uſe; wherefore without an eſtate re-made to the Feoffees, the ancient uſes did remain, and were not altered by the ſaid declaration, but remained to the husband and his heirs as before [l].

[l] M. 1 Eliz. Dy. fol. 166. the Lord *Audleys* Caſe.

If a man expreſs by a letter his will to diſpoſe of his Land, the Land ſhall go accordingly, and it's ſufficient to give the Lands, *per* 32 H. 8. It was the caſe of one *Weſt*, who was beyond Seas, and writ ſuch a letter, that he willed that his Lands ſhould go in ſuch a manner, and adjudged a good deviſe [m].

[m] M. 24 Eliz. *Weſts* Caſe. Moores rep. fol. 177.

A man deviſes ſuch rents as are mentioned in ſuch a writing under his hand and ſeal; adjudged it was a good deviſe in writing of the rents themſelves, and as good as if they had been ſpecially limited and expreſſed in the Will [n].

[n] H. 2 Jac. rot. 360. *Molineux* verſ. *Molineux*. Crok. part. 2. fol. 145.

A man made a deed of feoffment to ſeverall uſes, and maketh no livery, and after by his Will deviſeth the Land to ſuch perſons, and in ſuch manner as he appointed by his deed of feoffment; adjudged a good deviſe of the Land [o].

[o] *Fairfaxes* Caſe. Cu. Wardor.

A Will made at the interrogation of another is no Will within the Statute of 32 H. 8. and therefore if a man be asked if he will give his Lands to B. and anſwereth, yes; though it be reduced into writing, if it be not by the direction or agreement of the deviſor, it's no Will within the Statute, becauſe it is but an anſwer to a queſtion [p].

[p] M. 10 Jac. *Shuters* Caſe.

H. B. being ſick in *London* ſent for one *Tho. Atkins* a Counſellour at Law, and deſired him to write his laſt Will and Teſtament of his Lands, *&c.* the ſaid *Tho. Atkins* moved the ſaid H. B. to declare to him his laſt Will, who did declare it to him; the ſaid *Tho. Atkins* took paper and ink, and writ notes briefly of the ſaid Will, *ſcil.* every legacy which the ſaid H. B. did declare to him, and alſo the names of the Executors; after that the ſaid *Tho. Atkins* went to his houſe with the ſaid notes which he had written, and then immediately with his own hand writ the ſaid Will and Teſtament of H. B. in form; and when he had writ it before the hour of 12 in the forenoon the ſame day, the ſaid *Tho. Atkins* returned to the houſe of the ſaid H. B. within half an hour after the ſaid hour of 12, with the ſaid Will and Teſtament, to reade and deliver it to the ſaid H. B. but was told that the ſaid H. B. died at 12 of the clock before; whereupon *T. Atkins* delivered the ſame to the Executors which were therein named; the wife enters upon the Lands deviſed

viſed to her, the ſon enters upon her, the wife re-enters, whereupon the Plaintiff brought his writ: the opinion of all the Juſtices was, that it was a good Will in writing according to the Statute of 32 H. 8 9. q T. 4 & 5 Phil. & Mar. *Henry Browns* Caſe. Kelw. fol. 209. a. Anderſ. rep. c. 85.

Touching Wills, my advice is to all which have Lands, that by advice of Counſell learned by act executed they make aſſurances of their Lands according to their true intent, in full health and memory; to which aſſurances they may add ſuch conditions or promiſes of revocation as they pleaſe: for I have found great controverſies and doubts daily to grow and ariſe by reaſon of deviſes and laſt Wills, ſometimes in reſpect of the tenures of the land, at other times under pretence of revocations, which may eaſily be made by parol; alſo in reſpect of obſcure and inſenſible words, and repugnant ſentences, the Will being made in haſt; and ſome do pretend that the Teſtator, in reſpect of extremity of ſickneſs, was not of ſound memory; and divers other ſcruples and queſtions are moved about Wills. But if you pleaſe to deviſe your Land by Will,

1. Make it by good advice in your health and ſound memory, and inform your Counſell truly of the eſtate and tenure of your Lands, that it may be made according to the rules of Law, and ſo all queſtions and controverſies may thereby be prevented.

2. If your Will concerns Land and inheritance, it is good to make it indented, and to leave one part with a friend, leſt after your death your Will be ſuppreſſed.

3. At the time of the publication of your Will, take credible witneſſes which may ſubſcribe their names to it.

4. If it may be, let the whole Will be written with one hand in parchment or paper, for fear of alteration, addition, or diminution.

5. Let the hand and ſeal of the Deviſor be put to it.

6. If it be in ſeverall parts, let the hand and ſeal of the Deviſor, and the names of the witneſſes be ſubſcribed to every part.

7. If there be any interlining or raſure in the Will, let there be a *memorandum* of it.

8. If you make any revocation of your Will, or of any part of it, do it in writing by good advice; for upon revocations by paroll controverſies do ariſe, ſome of the witneſſes affirming it in one manner, and others in another manner †. † lib. 3. fol. 36. *Butler* and *Bakers* Caſe.

§ XII. Of a nuncupative Teſtament.

1. *What is a nuncupative Teſtament.*
2. *Wherefore it is called Nuncupative.*
3. *Of the force and effect of a nuncupative Teſtament.*
4. *At what time nuncupative Teſtaments are made, and what is the reaſon.*
5. *Teſtaments favourably expounded.*
6. *A nuncupative Teſtament made divers waies.*

A *Nun-*

A *Nuncupative* Teſtament (1) is, when the Teſtator without any writing doth declare his Will before a ſufficient number of witneſſes [a]. And it is called nuncupative (2) *à nuncupando, i. nominando*, of naming [b]; becauſe when a man maketh a nuncupative Teſtament, he muſt name his Executor, and declare his whole mind before witneſſes [c]. And (3) a nuncupative Teſtament is of as great force and efficacy (except for Lands, Tenements and Hereditaments) as is a written Teſtament [d]. This kind (4) of Teſtament is commonly made when the Teſtator is now very ſick, weak, and paſt all hope of recovery *. For (as one reporteth) it is received for an opinion amongſt the ruder and more ignorant people, that if a man ſhould chance to be ſo wiſe as to make his Will in his good health, when he is ſtrong and of good memory, having time and leiſure, and might ask counſell (if any doubt were) of the learned; that then ſurely he ſhould not live long after. And therefore they defer it untill ſuch time, when it were more convenient to apply themſelves to the diſpoſing of their ſouls, then of their lands and goods [f]. (5) And in conſideration hereof it is, that Teſtaments are ſo much favoured which be made in ſuch perillous times, namely, for that the Teſtator then cannot conveniently ſtay to ask counſell of ſuch points as be doubtfull in Law [g].

A (6) nuncupative Teſtament may be made not onely by the proper motion of the Teſtator, but alſo at the interrogation of another, as is hereafter declared [h].

Debt brought by Executors, the Defendant demanded Oyer of the Teſtament and had it; which was thus; *Memorandum*, that W. S. of *London* made this nuncupative Will in this manner, *viz.* he appointed T. W. and R. C. his Executors; and that was under the ſeal of the Ordinary: *per totam Curiam*, it is ſufficient to enable them to maintain an action, notwithſtanding it was but under the ſeal of the Ordinary, and not of the party. 4 H. 6. fol. 1. 5 H. 5. 1. *Brook* tit. *Teſtament.* H. 8. 3. 14 H. 6. 5. But *per Choke* Executors cannot have an action upon a nuncupative Teſtament, except it be after put in writing; and therefore the uſe is to prove it by witneſſes before the Ordinary, and then to write it. 10 E. 4. 1 [i].

[a] § Fin. Inſtit. de teſta. ordin. L. Hæredes palam. ff. de teſta.
[b] Minſing. in d. § fin. & Kling. in d. tit. de teſta. ordin. n. 11.
[c] Minſing. in d. § fin.
[d] L. Hac conſultiſſima. § per nuncupationem. C. de teſta. d. § fin. Inſtit. de teſta. ordin.
* *Termes of Law*, verb. Deviſe.
[f] Ibidem.
[g] Infra part. 4. § 4.
[h] Infra part. 4. § 26.
[i] 4 H. 6. 1. 5 H. 5. 1. 14 H. 6. 5. 10 E. 4. 1. Brok. tit. teſtament. pl. 8. 3.

§ XIII. Of priviledged Teſtaments.

1. *What is a priviledged Teſtament.*
2. *Wherefore they be called priviledged.*
3. *Divers ſorts of priviledged Teſtaments.*

Priviledged Teſtaments are thoſe (1) which are enriched with ſome ſpeciall freedom or benefit, contrary to the common courſe of Law [a]. They be termed (2) priviledged, *à privilegio, quaſi à privata lege* [b]. For a priviledge doth ſignify a private Law. Foraſmuch therefore as by a private or ſpeciall Law ſome Teſtaments be diſcharged

[a] Mantic. de conject. ult. vol. lib. 1. tit. 57. in fin.
[b] Summa Hoſtienſ. tit. de privileg. in prin.

or

or disburthened from the uſuall orders or obſervations of common or generall Law, in that reſpect they are called priviledged.

Of (3) priviledged Teſtaments there are three ſorts; *Teſtamentum militare*, *Teſtamentum inter liberos*, *Teſtamentum ad pias cauſas*: a Teſtament made by a Souldier, a Teſtament made by a father amongſt his children; and a Teſtament made for good and godly uſes. And although there be ſome other priviledged Teſtaments, yet their priviledges are but ſmall in compariſon of theſe three [c].

[c] Videlicet, teſtamenta ruſticorum, teſtam. tempore peſtis condita, & hujuſmodi, de quibus Ripa in tract. de peſte, c. 2.

§ XIV. Of a military Teſtament.

1. *The cauſes wherefore Souldiers enjoy ſuch priviledges in making their Teſtaments.*
2. *Wherein Souldiers are priviledged concerning the making of their Teſtaments.*
3. *Souldiers priviledged in reſpect of their own perſons, and of others alſo.*
4. *Souldiers priviledged in reſpect of Solemnities Teſtamentary.*
5. *Souldiers priviledged in reſpect of the ſubſtance and form of a Teſtament.*
6. *Three ſorts of men called Souldiers.*
7. *Whether all armed Souldiers enjoy theſe priviledges.*
8. *Whether Doctors of the Law and Clergy-men enjoy theſe priviledges.*
9. *The fruit which the Common-wealth reapeth by the ſtudy and practice of the Law.*
10. *What benefit doth redound unto us by the Clergy.*
11. *Whether the Souldier or the Lawyer are more honourable.*
12. *What manner of Teſtamentary priviledges Divines and Lawyers do enjoy.*
13. *All Doctors and Divines be not priviledged.*

FOraſmuch as (1) Souldiers, being better acquainted with weapons then books, are preſumed to have ſo much the leſſe knowledge in the Laws of peace, by how much they are the more expert in the Laws of Armis [a]: foraſmuch alſo as noble Warriours, in the defence of their Country, do oftentimes undertake perillous enterpriſes, wherein they loſe their lives or their lims, and ſeldom eſcape without wounds or bodily hurt [b]: As well therefore in regard of their ſmall skill in our peaceable Laws on the one ſide [c], as in recompence of their great perils and hurts in furious and cruell battels on the other ſide [d], they enjoy many notable priviledges and benefits in the making of their Teſtaments, (eſpecially by the Civill Law,) which are not allowed unto others *.

[a] L. fin. § C. de jure. d. lib. in fin. Vigil. & Minſing. in tit. de teſta. mil. Inſtit.
[b] L. quanquam. C. de teſta. mil. & ibid. Dec.
[c] Inſtit. de mil. teſt. in princ. And. Gail l. 2. practic. obſervat. c. 118.
[d] Dec. in d. L. quanquam. C. de mil. teſta.

Atque harum cauſarum prior eſt impulſiva, poſterior finalis. Gail ubi ſupr. * Vaſquius de ſucceſſ. reſoluc. li. 2. § 20. ubi enumerat 70 privilegia militibus indulta.

Of theſe (2) priviledges, ſome do reſpect the perſon of the Teſtator, ſome reſpect the perſon of the Executor or Legatary; ſome reſpect the ſolemnities about the making of the teſtament, and ſome reſpect the ſubſtance or form of the teſtament made [f]. Concerning the firſt kind of priviledge: whereas (3) there be many which be diſabled to make their Teſtaments, (as afterwards doth appear [g];) yet a Souldier is not diſabled by any of theſe impediments, unleſs it be by reaſon of *furor* or lack of reaſon, or for ſome other cauſes, when he is diſabled *jure gentium* [h]. Concerning the perſon of the Executor or Legatary: whereas there be divers which be prohibited to be Executors or Legataries to other perſons; yet they are not prohibited to be Executors or Legataries to a Souldier, (except in ſome few caſes [i].) Concerning (4) the ſolemnities of the Civil Law to be obſerved in the making of Teſtaments: Souldiers are clearly acquitted from the obſervation thereof [k]; ſaving that in the opinion of divers, Souldiers when they make their Teſtaments ought to require the witneſſes to be preſent [l]. But foraſmuch as no ſubject of this Land is ſtrictly tied to this obſervation, of requiring the witneſſes in the making of his teſtament [m], (thoſe onely ſolemnities being neceſſary which be *Juris gentium* [n];) therefore that opinion is not to take place here in *England*: otherwiſe this abſurdity would follow, that Souldiers ſhould be tied to more ſtrict obſervation then men of greater skill, and enjoy leſs liberty then they of leſs deſert [o]. Concerning (5) Military Priviledges which reſpect the form and ſubſtance of the Teſtament made: firſt, whereas no other perſon can die with two Teſtaments, yet a Souldier may; and both Teſtaments ſhall be deemed good, according to the will and meaning of the Teſtator [p]. And whereas another perſon cannot die partly teſtate and partly inteſtate, (at leaſt by the Civill Law [q],) yet a Souldier may [r]. And therefore if a Souldier make his teſtament, and therein appoint an Executor for goods in one place †, the next of kin ſhall have adminiſtration of goods in another place [t]. But this priviledge doth alſo belong to every ſubject of this Realm. Other priviledges there be, but it were too long to repeat them all [v].

[f] L. neque enim. ff. de mil. teſt. & ibi Bar. Sichard. in Rub. de teſta. mil. C. Mantic. de conject. ult. vol. lib. 6. tit. 1.

[g] Infra 2. part.

[h] Bar. in d. L. Neque enim. Minſing. in tit. de mil. teſta. Inſt. in prin.

[i] Bar. in d. L. neque enim. & infra part. 5.

[k] L. Divus. ff. de teſta. mil. § plane. Inſt. eod.

[l] Quorum opinio cõmunis eſt, ut refert Jul. Clar. § teſt. q. 58.

[m] Supra § j. in prin. cum notat. ibidem.

[n] Supra § x. in prin.

[o] Vide quæ ſuperius dicta ſunt § x. n. 5. cũ notis marg. Rogationem non requiri ex neceſſitate, Teſtatur Lindw. in c. ſtatutum. de teſtamentis. li. 3. provinc. conſtit. Cant. verb. probatis.

[p] L. Quærebatur. ff. de mil. teſta.

[q] L. jus noſtrum. de reg. jur. ff.

[r] L. Miles. C. de teſta. mil.

† D. L. Miles.

[t] Fitzherb. Abridg. tit. exec. n. 26. & infra part. 4. § 17. § 18.

[v] Vide (ſi placeat) Vaſqu. de ſucceſſ. reſoluc. l. 2. § 20. ubi enumerat 70 privilegia quæ militibus competunt.

After we have viewed what priviledges do belong to Souldiers, it ſhall be expedient to ſhew what manner of Souldiers they be to whom theſe priviledges are granted. Wherefore we are to underſtand, that there (6) be three ſorts of men which be termed in Law by the name of Souldiers. The firſt be *Milites armati*, armed Souldiers: (ſuch as are above deſcribed:) the ſecond be *Milites literarii*, lettered Souldiers, as Doctors of the Law: the third ſort are *Milites cœleſtes*, celeſtiall or heavenly Souldiers, as Clergy-men and Divines: for ſo the Law doth term them [x]. Concerning the firſt ſort, (7) either they be ſuch as lie ſafely in ſome Caſtle or place of defence, or beſieged by the enemy, onely in readineſs to be imployed in caſe of invaſion

[x] Minſin. in Rub. de teſta. mil. inſtit.

vaſion or rebellion ; and then they do not enjoy theſe Military Priviledges [y] : or elſe they be ſuch as are in expedition or actuall ſervice of Wars ; and ſuch are priviledged [z], at leaſt during the time of their expedition [a], whether they be employed by land or by water [b], and whether they be horſemen or footmen [c]. (8) Concerning the other two ſorts of Souldiers, many are of this opinion, that they do not enjoy the aforeſaid Priviledges [d], becauſe they are not ſouldiers properly ſo called, but metaphorically *. Others are of a contrary opinion ; affirming (9) that the great pains and ſtudious travell of learned Lawyers (eſpecially Doctors of Law and ſuch like) are no leſs beneficiall to their Country, then the hardy adventures of thoſe armed Souldiers : for that without Laws no Common-wealth can be governed : and in that reſpect deſerve as great priviledges as they [f]. Much (10) more then (by all probabilities) are thoſe Spirituall Souldiers worthy of all priviledges, by whoſe prayers and interceſſions the wrath of God is appeaſed, and victory many times obtained, and without whoſe Miniſtery Chriſtianity would quickly be ruinated and ſubverted [g].

[y] Intellige ſtationarios & limitaneos milites: de quibus Viglius, & poſt eũ Minſing. in § illis autem. Inſtit. de teſt. mil. & Jul. Clar. § teſtm. q. 15. in fin. Adhibe duas alias micas ſalis, unam ex Zaſio, in L. Miles. ff. de re jud. n. 5. alteram è Decio, in Rub. de teſta. mil. C. n. 3.

[z] L. Pen. C. de teſta. mil. Mantic. de conject. ult. vol. l. 6. tit. 1. n. 32.

[a] § Sed hacten. Inſt. de mil. teſta. Clar. § Teſta. q. 15. n. 4. And. Gaill. obſervat. 118.

[b] Michael Graſ. Theſaur. com. op. § teſtm. q. 3. n. 1. Zaſ. in L. miles. ff. de re jud. n. 5. in fin. [c] Dec. in Rub. de teſta. mil. C. n. 5. Ripa in L. centurio. ff. de vulg. ſub. n. 11. [d] Sichard. in Rub. de mil. teſt. c. 9. Jaſ. Ripa & alii in L. centurio. in de vulg. ſub. ff. quorum op. com. eſt, ut refert Vaſq. de ſucceſ. crea. § 24. n. 23. * Minſing. in Rub. de mil. teſta. Inſtit. n. 2. [f] Michael Graſ. Theſaur. com. op. § teſtm. q. 4. Alex. in d. L. centurio. qui tamen aliis fundamentis nititur. [g] Alex. in d. L. centurio. n. 18.

And yet doubtleſs it is more doubtfull in Law, whether theſe Military Priviledges do appertain to Teſtaments made by Clergy-men, then if they were made by Lawyers [h]. The reaſon may be, becauſe howſoever Divines be worthy ; yet they be otherwiſe rewarded, though not in this [i] : which reaſon notwithſtanding doth not ſo fully ſatisfie. For if Doctors and pleaders of the Law be therefore priviledged, becauſe they be compared to Souldiers [k] ; for that like valiant Champions, by force of Learning, ſtrength of wit, and mighty power of eloquence, they defend their Clients cauſes againſt the ſubtilties and injuries of their adverſaries : how much more ought our Clergy-men Divines, our Captains in the ſpirituall warfare of this life, by means of whoſe ſacred miniſtery, and virtue of whoſe godly inſtruction, and might of preaching that powerfull and invincible Word, not our purſes, nor our bodies, but even our ſouls are defended and kept in ſafety, againſt the cruell aſſaults of that bloudy and mortall enemy of mankind, (who ſeeketh by all malicious means, like a roaring Lion, whom he may devour ;) and againſt his huge Hoſt of wicked ſpirits, who never reſt day nor night, nor minute of an hour, but ſtill ſtrive with might and main to overthrow us, and to bring us all to everlaſting deſtruction ? how much more, I ſay, are theſe our Captains in theſe ſo terrible conflicts to be gratified and dignified with all manner of Military Priviledges [l] ? Wherefore if the matter reſt upon the iſſue of deſert and worthineſs, without doubt, of theſe three forenamed Souldiers, the Divine is not the laſt, but the foremoſt.

[h] Ripa in d. L. centurio. ff. de vulg. ſub. n. 19. poſt Socin. Jaſon. Claud. & alios ibid. & Matheſilla, not. 61. Graſſ. Theſaur. com. op. § teſtm. q. 5.

[i] Vaſ. de ſucceſ. crea. § 24. n. 31. in fin.

[k] Gloſſ. & DD. in L. miles. ff. de re jud. Mentionem autem feci non ſolum de doctoribus, ſed de aliis etiam cauſidicis, propterea quod licentiati ratione exercitii privilegiis militaribus fruuntur. Teſte Ripa. d. L. centurio. n. 18.

[l] Arg. à min. ad maj.

Concerning the (11) other two, (the Lawyer I mean and the Souldier,) whether of them deſerveth better of the Common-wealth, and whether is to be preferred before the other, is a queſtion ſo incident to this controverſy, and cleaveth ſo cloſe thereunto, that there be few Writers which handle the one, but they alſo touch the other [m]. In the determination whereof, if the Interpreters of the Law may be Judges in their own cauſe, then the ſentence muſt needs be, *Cedant arma togæ* [n].

[m] Alex. Jaſ. Ripa in d. L. centurio. Vaſq. de ſucceſ. crea. § 14. n. 31.

[n] Vaſq. in d. § 24. n. 31. Jaſ. in L. pen. C. de pactis, n. 4. Angel. Are. in § fin. Inſtit. de mil. teſta. Alex. in d. L. centurio. n. 14. & Ripa ibidem, n. 15. Panor. & Canoniſtæ in L. quando de magiſtr. extr. n. 3. Feli. in Rub. de major. & ob. extr. col. 2.

Compariſons be odious. For mine own part, if you will give me leave, I will tell you a tale out of *Zaſius* [o], writing upon this queſtion, which ſhall be as true as any in *Æſop*'s Fables. A certain Painter (ſaith he) meaning by his art to deſcribe the ſtrength of Man, did paint a little Man riding upon a huge Lion, as if a Man were ſtronger then a Lion. A Lion paſſing by, demanded of the Painter, wherefore he made ſuch a picture. Becauſe (quoth the Painter) my Man is able to tame any Lion, as eaſily as an Horſe or an Aſs. Well, ſir, ſaid the Lion, if we could paint, thou ſhouldſt ſee a Lion devouring a Painter. Eloquent men are as Painters, valiant Souldiers as Lions. Hitherto in jeſt: but now in earneſt, yet without offence. It is not the golden Chain, nor the Plume of Feathers, nor the big looks, nor the proud brags, which make a right Souldier [p]. Neither is it the long Gown, nor the grave Beard, nor the ſtately geſture, which make a good Lawyer [q]. The counterfeit of either deſerveth no honour; be he never ſo brave, never ſo grave. If both be as they ſhould, the preeminence in matters of War is the Souldier's; in matters of peace it is the Lawyer's [r]. In other matters, he is the more honourable which doth more honour the other. To return to the former queſtion, whether (12) theſe Souldier-like Lawyers may challenge theſe former Teſtamentary priviledges: We are to diſtinguiſh betwixt priviledges granted to Souldiers (ſo properly called) in reſpect of their want of skill, and ignorance in matters of that quality, (for ſuch do not belong to the Learned,) and priviledges of prerogative or deſert. For theſe kinds of priviledges belong alſo to Doctors and Clergy-men [t]: but (13) with this reſtriction; that as they belong not to every Souldier, but onely to ſuch as are in action; ſo they belong not to Doctors utterly *non-proficient*, or Clarks unlawfully *non-reſident*, but ſuch as painfully attend their profeſſion, and diligently labour in their vocation [s].

[o] Zaſ. in L. miles. de re jud. ff. n. 8.

[p] Zaſ. in d. L. miles. n. 5.

[q] Cucullus non facit Monachum.

[r] Zaſ. in d. L. centurio. n. 20. Alex. in e. and. L. n. 14. Gail li. 2. pract. obſer. 118. n. 16.

[t] DD. in L. miles. & L. centurio. ff. de re jud. Michael Graſſ. Theſaur. com. op. § teſtim. q. 5. n. 5.

[s] Graſſ. d. q. 5. Viglius in d. § j. Inſtit. de teſta. mil. Sichard in L. fin. ſi quis vero. C. de codicil. n. 5.

§ XV.

§ XV. Of the Teſtament of the Father amongſt his Children.

1. *What is a Teſtament amongſt Children.*
2. *That Teſtament is preſumed laſt, which is made in favour of Children.*
3. *If two Teſtaments be found, and it do not appear which is firſt or laſt, neither is good.*
4. *The Teſtament made in favour of children is not ſo eaſily revoked as another Teſtament.*
5. *What manner of mention is to be made in the latter Teſtament, to take away the former made in favour of Children.*
6. *Certain caſes wherein the Teſtament made in favour of Children may be taken away by the ſecond, without any mention of the former.*
7. *Whether a Teſtament may be proved which hath no witneſſes of the making thereof.*
8. *The priviledge of proof without witneſſes, whether it be peculiar to one kind of Teſtament.*

THe ſecond kind of priviledged Teſtaments is, *Teſtamentum inter liberos*, a Teſtament amongſt children [a]: that is to ſay, (1) wherein the father nameth his lawfull and naturall children his Executors, giving to them the reſidue of his goods [b]. Unto which kind of Teſtament divers priviledges do appertain [c]. The firſt priviledge is this, If (2) two Teſtaments be found after the death of the Teſtator, of divers tenours, and it doth not appear which of them is the latter Teſtament; in this doubt that Teſtament is preſumed the latter, and ſo ſhall prevail, which is made in favour of the children [d]. Whereas if (3) neither be in favour of the children, nor otherwiſe priviledged, neither Teſtament ſhall prevail, but both are void, the one deſtroying the other *. Unleſs the Teſtaments be made by a Souldier; for then it ſeemeth that both Teſtaments ſhall prevail, becauſe he may (if he will) die with two Teſtaments [f].

[a] Mantic. de conject. ult. vol. lib. 1. tit. 7. in fin.
[b] L. ex hac conſultiſſima. § ex imperfecto. C. de teſta. & ibi DD.
[c] d. § ex imperfecto. & L. fin. C. famil. herciſcun. Mantic. de conject. ult. vol. lib. 6. tit. 2.
[d] Bar. in L. j. § j. de bon. poſſ. ſecundum tab. ff. Clar. § teſtm. q. 10.
* L. fin. de hæred. qui. de acquir. her. ff.
Inſtit. L. jus noſtrum. de reg jur. & Cagnol. ibidem, n 8. Bald. & Caſtr. in L. eum
[f] L. quærebatur. de teſta. mil. ff. Bar. in d. L. j. § j. de bon. poſſ. ſecundum tab. ff.

Another priviledge is this, The (4) Teſtament made in favour of children is not ſo eaſily revoked as other Teſtaments are [g]: for whereas in other Teſtaments, the former is revoked or infringed by the latter, and that *ipſo jure* [h], without any expreſs revocation of the former, and without any kind of mention of the former Teſtament, either generall or ſpeciall [i], (certain caſes excepted:) yet (5) by the Civill Law, if the Father have once made a Teſtament, wherein he hath preferred his children as before, the ſame is

[g] Auth. hoc inter liberos. C. de teſta. & gloſſ. ibid.
[h] § poſteriore. Inſtit. quibus mod. teſt. infir.
[i] Infra part. 7. §. 144.

not revoked by a latter Teſtament, wherein ſtrangers are preferred, (whether the former be a written Teſtament or Nuncupative,) unleſs in the latter Teſtament there be ſpeciall mention of the former [k]. So (6) that it is not ſufficient for the Teſtator to make generall mention, ſaying, I make this my laſt Will, notwithſtanding any former Teſtament; but he muſt make ſpeciall mention, as, notwithſtanding any former Teſtament made amongſt my children [l]. Or unleſs the ſecond Teſtament be made *ad pias cauſas* [m]. Or elſe ſome great diſpleaſure or enmity have happened betwixt the father and the children [n]; or ſome like cauſe have come to paſs, whereby it may appear that the Father did repent him of the making of his ſaid Will [o].

[k] d. Auth. hoc inter liberos. Alex. Jaſ. Sichar. ibidem. quorum opinio communis eſt, contra Angel. ut inquit Graſſ. Theſaur. com. op. § teſtm. q. 86. n. 11.

[l] Mantic. de conject. ult. vol. lib. 6. tit. 2. n. 19. & Sichard. in d. Auth. Hoc inter.

[m] Jaſ. in d. Auth. Hoc inter.

[n] Graſſ. Theſaur. com. op. § teſtm. q. 86. n. 11.

[o] Graſſ. ibid.

Another priviledge granted by the Civill Law to a Father's Teſtament amongſt his children is this, That the (7) ſame take effect, albeit there be no witneſſes to prove the ſame: as when there is a Teſtament found in ſome Cheſt, or like place, written or ſubſcribed with the Teſtator's hand, or by him procured to be written by ſome other [p]. Howbeit I do ſuppoſe that by (8) the generall cuſtome of this Realm of *England*, thoſe two priviledges be not proper or peculiar to Fathers Teſtaments alone, but that the ſame are common to all other *Engliſh*-mens Teſtaments; and namely the latter priviledge, when it doth appear undoubtedly to be written or ſubſcribed with the Teſtator's own hand, or it is proved that the Teſtator cauſed the ſame to be written by another. How this proof is to be made, that the Teſtament is written or ſubſcribed with the Teſtator's own hand, is declared in another place [q].

[p] Bald. Paul. de caſtr. & Jaſ. in Auth. quod ſine. C. de teſt.

[q] Infra part. 4. § xxv.

Other priviledges there be, whereby theſe kinds of Teſtaments are free from ſundry obſervations and ſolemnities wherewith other Teſtaments are charged. But becauſe they are alſo common to all our Teſtaments here in *England*, it were improper to repeat them in this place under the Title of Priviledges.

§ XVI. Of a Teſtament *ad pias cauſas.*

1. *A Teſtament* ad pias cauſas *may be ſo termed either in reſpect of perſons or places.*
2. *A Teſtament* ad pias cauſas *may be made by ſtrange and unaccuſtomed notes.*
3. *A Teſtament* ad pias cauſas, *being found cancelled, is not preſumed to be adviſedly cancelled by the Teſtator.*
4. *In a Teſtament* ad pias cauſas, *whether the condition ought to be obſerved preciſely.*
5. *A Teſtament* ad pias cauſas *is not void by reaſon of uncertainty.*
6. *Whether all priviledges which belong to a Military Teſtament, or to a Teſta-*

a Teſtament amongſt the Teſtator's children, do alſo belong to a Teſtament ad pias cauſas.

7. *What if there appear two priviledged Teſtaments, and it doth not appear which is later? whether ſhall be preferred?*

THe third kind of priviledged Teſtaments is that Teſtament *ad pias cauſas* [a]: Which is ſo termed (1) not onely in reſpect of perſons, (as when the Teſtator willeth his goods to be diſtributed to young Orphans, Widows, Strangers, Priſoners, Lame and diſeaſed perſons, ſo that they be poor and needy, ſuch as the Law termeth *miſerable perſons*;) but alſo in reſpect of places: as when the ſame is left to Hoſpitals, to Churches, to repairing of Bridges, Walls of a Town or City, when the ſame be decayed and ſtand in need to be repaired [b]. And ſuch a Teſtament hath very many priviledges [c].

[a] Mantic. de conject. ult. vol. l.b. 1. tit. 7. in fin. & in l. 6. tit. 3.

[b] Lindw. in c. ita quorundam. verb. pias cauſas. de teſta. lib. 3. provincial. conſtitut. Cant. & latiſſime Tiraquel. tract. de privileg. piæ cauſæ in præf. ejuſd. [c] Tiraquel. in d. tract. ubi enumerat 170 privilegia piæ cauſæ, quorum tamen longe maxima pars competit ſingulis Anglorum Teſtamentis, etiamſi non ſint condita ad pias cauſas.

One priviledge is, That (2) this kind of Teſtament may be written with ſtrange and unaccuſtomed characters or notes; as in ſtead of A. the firſt figure 1. in ſtead of B. the ſecond figure 2. in ſtead of C. the third figure 3. or with ſome other more ſtrange deviſed Letters. Yet nevertheleſs the ſame is as effectuall, as if it had been written after the uſuall and accuſtomed manner [d].

[d] Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 3. Tiraquel. de privileg. piæ cauſæ, c. 12. vide infr. part. 4. § 25.

Another priviledge is this, That if the (3) Teſtament *ad pias cauſas* be found cancelled, and it is not known whether the Teſtator did willingly and wittingly cancell the ſame, the Law doth preſume it to be cancelled unadviſedly *; and ſo it is in effect as if it had not been cancelled at all: whereas in other Teſtaments the contrary is preſumed; that is, that the Teſtator did wittingly and willingly cancell the ſame [f]; whereby they are made void, as afterward is declared [g].

* Covar. in Rub. de teſta. 2. par. n. 19. Gravetra conſil. 128. Mantic. de conject. ult. vol. lib. 12. tit. 2. n. 32.

[f] Alex. conſil. 104. n. 6. vol. 7. Mantic. de conject. ult. vol. lib. 12. tit. 1. num. 30. [g] Infra part. 7. § 16.

Another priviledge is, That for the obtaining of any thing left conditionally *ad pias cauſas*, it is (4) ſufficient the condition be accompliſhed by other means, then according to the preciſe form of the condition [h]. Whereas in other Teſtaments or Legacies it is not ſufficient, unleſs the condition be preciſely obſerved [i].

Another priviledge is, That the (5) Teſtament *ad pias cauſas* is not void in reſpect of uncertainty, (as other Teſtaments are:) and therefore if the Teſtator ſay, I make the poor my Executors, or, I will that my goods be diſtributed amongſt the poor; ſuch manner of appointing Executors or Legacies is not void [k].

[h] Tiraquel. de privileg. piæ cauſæ, c. 82. [i] L. Mevius. L. qui hæredi. de cond. & demon. ff. vide infra part. 4. § 7.

[k] Bar. & Jaſ. in L. j. C. de ſacroſanct. Eccleſ. Graſſ. Theſaur. com. op. § Inſtitut. q. 12.

Gene-

Generally I ſuppoſe, that (6) whatſoever priviledge doth belong either to a Military Teſtament, or to a Teſtament made by the Father amongſt his children, in reſpect of the ſolemnities to be obſerved in the making of Teſtaments [l], or the ſubſtance of Teſtaments [m], that the ſame do alſo appertain to a Teſtament *ad pias cauſas*; ſaving in ſome caſes, and namely, where the priviledges of both the former kinds of priviledges be contrary; as where two Teſtaments be extant, and it doth not appear which is former or latter. In which caſe it ſeemeth that, if they be Military Teſtaments, that then they are both good, otherwiſe they are both void [n]. But if the one of them be *ad pias cauſas*, then that is preſumed laſt, and ſo available, the other not being priviledged [o].

[l] Jure civili non valet teſtm. ad pias cauſas abſque ſolennitatibus conditum; ſecus jure canon. modo adhibeatur ſolennitas juris gentium: & hæc eſt communis opin. Graſſ. Theſaur. com. op. § teſtm. q. 18. Boer. Deciſ. 93. n. 3. unde non requiritur, ut teſtes ſint rogati in confectione teſtm. ad pias cauſas, ut habet communis opinio. Teſtibus Covar. in c. relatum. el. j. de teſta. ext. n. 4. Tiraquel. de privileg. piæ cauſæ, c. 3. & Graſſ. d. q. 18. n. 5. [m] C. cum tibi. de teſta. extr. Quid autem reſpectu perſonæ teſtantis? Dic ut per Ju. Clar. § teſtm. q. 5. [n] Supra § 14. [o] Jaſ. & Sichard. in L. fin. C. de Edict. D. Adrian. tollend.

But (7) what if both Teſtaments be priviledged, the one being *inter liberos*, the other *ad pias cauſas*, and it doth not appear which is former or latter? which ſhall prevail? I ſuppoſe that which is *inter liberos* [p]: for the children are to ſucceed in caſe both the Wills were void [q], and ſo have a double help, the one of the Teſtament, the other of proviſion of Law [r]. And it were hard to take the Teſtator's goods from his children, unleſs it did plainly appear that the other were the latter †. Howbeit, it ſeemeth that if the Teſtament were not in favour of his children, but of ſome other of his Kin, that then the Teſtament *ad pias cauſas* were to be preferred; unleſs they did prove the Teſtament made in their favour to be the latter [s].

[p] Mantic. de conject. ult. vol. l. 6. tit. 3. n. 43.

[q] Bar. in L. j. § de bon. poſſeſſ. ſecundum tab. ff. ſtat. H. 8. an. 21. c. 5.

[r] L. utrum. § ult. ff. de minor. Alciat. de præſumt. reg. 3. præſump. 43. n. 3.

† Unde Aug. Quicunque (inquit) vult, exhæredato filio, hæredem facere Eccleſiam, alium patronum quærat quam Auguſtinum. c. ult. 17. q. 4. [s] Mantic. de conject. ult. vol. l. 6. tit. 3. n. 43.

§ XVII. Of Teſtaments unpriviledged.

1. *Unpriviledged Teſtaments what they are.*

Unpriviledged Teſtaments are they, (1) which have not any freedom or benefit contrary to the common courſe of ordinary Law, but are tied to ſuch obſervations as the Law requireth, and hath appointed regularly for all Teſtaments. Of which forms we ſhall diſcourſe hereafter, when opportunity ſhall ſerve.

WHAT

WHAT PERSONS MAY MAKE A TESTAMENT.

The Second Part.

§ I.

1. *Every perſon may make a Teſtament which is not forbidden.*
2. *Divers perſons forbidden to make their Teſtaments.*
3. *Some forbidden for want of diſcretion.*
4. *Some forbidden for want of freedome.*
5. *Some forbidden for want of their principall ſenſes.*
6. *Some forbidden by reaſon of ſome hainous crime.*

IN the Second part of this Teſtamentary Treatiſe ſhall be declared (God willing) what perſons may make a Teſtament, and who may not ſo doe.

Wherein it may be ſet down for a rule, That (1) every perſon (both man and woman, Chriſtian and Jew, ſound or ſick, and generally of what ſtate or condition ſoever he or ſhe be) hath full power and liberty to make a Teſtament or laſt Will [a], and may therein diſpoſe of his goods and chattels [b]; ſaving ſuch perſons as be prohibited by Law or by Cuſtome [c].

[a] Inſtit. Quibus non eſt permiſſum teſtam. fac. in prin. & gloſſ. ibid. Simo de Prætis de inter ult. vol. l. 2. inter. 1. fol. 4. Vaſquius de ſucceſſ. progreſſ. lib. 1. § j. Michael Graſſ. Theſaur. com. op. § teſtm. q. 20. [b] Quibus enim permiſſum eſt teſtari, eiſdem & codicillari, & legata relinquere. Roland. tract. de codicil. n. 6. Michael Graſſ. Theſaur. com. op. § codicil. n. 1. [c] Eſt enim edictum de teſtamentis prohibitorium certarum perſonarum. gloſſ. in § j. Inſt. Quibus non eſt permiſſum teſta. fac. Graſſ. Theſaur. com. opin. teſt. quæſt. 20. n. 1.

Therefore if we ſhall diligently examine what perſons are forbidden by Law or by Cuſtome, it will eaſily appear who they are that can make a Teſtament, or diſpoſe of their goods and chattels. And albeit (2) many perſons are forbidden by Law or Cuſtome to make Teſtaments, yet they are reduced by ſome unto four or five ſorts [d]. Amongſt the firſt (3) are comprehended ſuch as *want diſcretion* or judgment; as Children *, Mad folks [f], and Idiots [g]: to whom alſo I may joyn thoſe perſons who be ſo very old that they become childiſh again [h]; and him that is drunk [i].

[d] Bar. & Bald. in L. Si quæramus. ff. de teſt. Lindw. in c cum viris. de teſt. l. 3. provincial. conſtit. Cant.
* Infra ead. part. § 2.
[f] Infra ead. part. § 3.
[g] Infra ead. part. § 4.
[h] Infra ead. part. § 5.
[i] Infra ead. part. § 6.

Amongſt the ſecond (4) ſort are comprehended ſuch as *lack free-dom and full liberty*; as Bond-ſlaves and Villains [k]: unto whom may be added Captives and Priſoners [l], and Women covert [m].

In the third ſort (5) are contained ſuch as *lack ſome of their principall ſenſes*; namely ſuch as be dumb and deaf [n], and blind [o].

Among the fourth ſort (6) are placed ſuch as for *ſome hainous crime* are deprived of ability of making of Teſtaments; as Traitours [p], Felons [q], Hereticks [r], Apoſtates [†], and many others [t].

And laſt of all, others (7) for other cauſes hereafter ſpecified [v].

[k] Infra ead.part. § 7.
[l] Infra ead.part. § 8.
[m] Infra ead.part. § 9.
[n] Infra ead.part. §10.
[o] Infra ead.part. §11.
[p] Infra ead.part. §12.
[q] Infra ead.part. §13.
[r] Infra ead.part. §14.
[†] Infra ead.part. §15.
[t] De quibus infra ead. part. §§ 16, 17, 18, 19, 20, 21, 22.
[v] Infra ead. part. §§ 23, 24. cum ſequentibus. Vide Jo. ab Imol. in c. qua ingredientibus. de teſta. extr. ubi hæc ſunt carmina; *Teſtari nequeunt impubes, religioſus, Filius in ſacris, morti damnatus, & obſes, Crimine damnatus, cum muto ſurdus, & ille Qui majeſtatem leſit, ſit cæcus & ipſe.*

§ II. Of Children.

1. *At what age a Teſtament may be made of lands.*
2. *At what age a Teſtament may be made of goods.*
3. *What if the* minor *be* doli capax, *or a ſouldier, or the Teſtament be* ad pias cauſas *?*
4. *What if the Teſtament be made with the authority of the Tutour?*
5. *What if the Teſtator do live untill he come to lawfull age?*
6. *A boy after* 14 *years, a woman after* 12, *may make a Teſtament of their goods.*
7. *What if the laſt day of the year be not finiſhed?*
8. *What if the Teſtament, made during minority, be approved by the Teſtator after he be of full years?*

IF we will underſtand when a Child may make his Teſtament, we muſt diſtinguiſh whether the Teſtament be of *lands* or of *goods*.

If of lands, (1) it is provided by the ſtatutes of this Realm, that wils or teſtaments made of any mannors, lands, tenements, or other hereditaments, by any perſon within the age of 21 years, ſhall not be taken to be good or effectuall in law [a]; for untill that time, by the common laws of this Realm, they be accompted infants [b].

If (2) of goods, we muſt diſtinguiſh, whether the child be man or woman. A boy cannot make his Teſtament before he have accompliſhed the age of 14 years, nor a wench before ſhe have accompliſhed the age of 12 years [c]. Inſomuch that (3) if before theſe foreſaid years they were of that ripeneſſe of wit, that they were *dolicapaces*, capable of deceit, or able to diſcern betwixt good and evill, and betwixt truth and falſhood; yet could they not make any Teſtament, nor diſpoſe of their goods [d]. Or if the boy were of that ſtrength, that he were a ſouldier, notwithſtanding thoſe great priviledges which do belong to ſouldiers in making of their Teſtaments, yet could not he make his Teſtament, before he had accompliſhed his age of 14 years *. Neither can a boy before

[a] Stat. H. 8. an. 34. c. 5.
[b] Doct. & Stud. lib. 1. c. 21. lib. 12. c. 28.
[c] L. qua ætate. ff. de teſta. § prærerea. Inſtit. quibus non eſt permiſſum teſta. fac. L. ſi frater. C. qui teſta. fac. poſſ.
[d] DD. in d. L. qua ætate. quorum opinio communis eſt, ut aiunt Graſſ. Theſaur. comm. op. § teſtm. q. 20. & Vivius eod. l. b. verb. pupillus, n. 7.
* L. ult. C. de teſtam. mil. Graſſ. & Vivius ubi ſupra, referentes hanc op. eſſe com.

before he have accompliſhed 14 years of age, nor a wench before ſhe have accompliſhed 12, make a Teſtament *ad pias cauſas* [f]. Neither (4) is the Teſtament good, made by the boy or wench before the ſaid ages, although the ſame ſhould be made by the authority or conſent of the Tutour [g]. Neither (5) doth the Teſtament become good being made in their minorities reſpectively aforeſaid, albeit they ſhould afterwards attain to their ſeverall ages, wherein they might make their Teſtaments [h].

Howbeit (6) a boy after the age of 14 years, and a wench after the age of 12 years, may make a Teſtament and diſpoſe of their goods and chattels [i]; and that not onely without the authority or conſent of their Curator or Guardian [k], but alſo without the authority and conſent of the father, if he or ſhe have any goods of his or her own [l]. Or if (7) he or ſhe hath attained to the laſt day of 14 or 12 years, the Teſtament by him or her, in the very laſt day of their ſeverall ages aforeſaid, is as good and lawfull, as if the ſame day were already then expired [m]. Likewiſe (8) if after they have accompliſhed theſe years of 14 or 12, he or ſhe do expreſly approve the Teſtament made in their minority, the ſame by this new Will and declaration is made ſtrong and effectuall [n].

[f] Jaſ. in L. ſi frater. qui teſta. fac. poſſ. c. atque hæc opinio communi calculo comprobatur. Jul. Clar. § teſtm. q. 5. & Graſſ. § teſtm. q. 17.

[g] Jaſ. in d. L. ſi frater. C. qui teſta. fac. poſſ.

[h] § præterea. Inſtit. quibus non eſt permiſſ. teſta. fac. L. ſi filiusfamilias. ff. qui teſta. fac. poſſ.

[i] d. L. qua ætate. ff. de teſta. Perkins tit. deviſe, fol. 97. quamvis impreſſio ſit vitioſa: viz. litera (x) omiſſa; nam quod ſic ſcribitur, iiij. ans, ſcribi debuit, xiiij. ans.

[k] Jaſ. in L. ſi frater. qui teſta. fac. poſſ. C.

[l] Verum quidem eſt, quod jure civili filiusfamilias teſtari nequeat ob illam patriam, cui ſubjicitur, poteſtatem. At vero in Anglia ceſſat perampla hæc poteſtas & prærogativa. trac. de repub. Angl. lib. 3. c. 7. & ſic ceſſante cauſa, ceſſat effectus. [m] d. L. qua ætate. & ibi Bar. [n] Paul. de caſt. & alii in L. ſi frater. qui teſta. fac. poſſ. C.

But by the law of this Nation an infant before the age of 18 years cannot make his Teſtament, and conſtitute Executors for his goods and chattels. Inſt. part. 1. fol. 89. b. Adminiſtration granted *durante minore ætate* ſhall ceaſe at the age of 17 years. H. 40 Eliz. C. B. *Piggots* Caſe. lib. 5. fol. 29. Therefore before that age he cannot make his Will.

§ III. Of Mad folks and Lunatick perſons.

1. *Mad and Lunatick perſons cannot make a Teſtament, and what is the reaſon.*
2. *Whether the Teſtament made in the time of* furor *be good when the Teſtator is come to himſelf.*
3. *A Teſtament may be made by a Lunatick perſon betwixt the fits.*
4. *Every one is preſumed to be of perfect mind and memory, untill the contrary be proved.*
5. *He that objecteth inſanity of mind, muſt prove the ſame.*
6. *Whether it be ſufficient to prove that the Teſtator was mad before the making of the Will.*
7. *Whether he that is once mad be preſumed ſo to continue.*
8. *Inſanitie of mind hard to be proved.*
9. *Witneſſes muſt yield a reaſon, if they will prove a man to be mad.*
10. *Arguments of madneſſe.*
11. *Whether a generall reaſon ſuffice to prove inſanity of mind.*

12. *Whether madneſſe may be proved by ſingular witneſſes.*
13. *Thoſe witneſſes are to be preferred, which depoſe that the Teſtator was of ſound mind.*
14. *What if the Teſtament be made by a lunatick perſon, and the time of the making unknown? whether is the Teſtament good or no?*
15. *What if it cannot be proved that the Teſtator had quiet intermiſſions?*
16. *What if there be a mixture of wiſe things and fooliſh in the Teſtament?*

MAD folks (1) and Lunatick perſons, during the time of their *furor* or inſanity of mind, cannot make a Teſtament, nor diſpoſe any thing by will [a], no not *ad pias cauſas* [b]. The reaſon is moſt forcible, becauſe they know not what they doe [c]. For in making of Teſtaments, the integrity or perfectneſſe of mind, and not health of the body, is requiſite [d]. And thereupon aroſe that common clauſe, uſed in every Teſtament almoſt, *ſick in body, but of perfect mind and memory* *. Therefore P. 3 Jac. in *Combes* Caſe, *in Camera ſtellata*, it was agreed by the Judges, that ſane memory for the making of a Will is not at all times when the party can ſpeak yea or no, or had life in him, nor when he can anſwer to any thing with ſenſe; but he ought to have Judgement to diſcern and to be of perfect memory, otherwiſe the will is void ‖. And ſo (2) ſtrong is this impediment of inſanity of mind, that if the Teſtator make his Teſtament after this *furor* have overtaken him, and whiles as yet it doth poſſeſſe his mind, albeit the *furor* afterwards departing or ceaſing, the Teſtator recover his former underſtanding, yet doth not the Teſtament made during his former fit recover any force or ſtrength thereby [f]. Howbeit (3) if theſe mad or lunatick perſons have clear or calm intermiſſions, then during the time of ſuch their quietneſſe and freedom of mind, they may make their Teſtaments, appointing Executors, and diſpoſing of their goods at their pleaſures [g]. So that neither the *furor* going before, nor following the making of the Teſtament, doth hinder the ſame Teſtament begun and finiſhed in the mean time [h]. Much more is that Teſtament good and available in law, not onely for goods and chattels, but alſo for lands, tenements and hereditaments, which was made by one of ſound memory, never affected with any lunacy or any inſanity of mind, untill the ſame were fully accompliſhed and finiſhed: for then, albeit afterwards the Teſtator be overtaken and oppreſſed with inſanity of mind, (which is a thing not rare a little before mens deaths,) yet that ſubſequent diſability doth not diſannull the precedent Teſtament, or laſt Will [i]; the rather, becauſe this infirmity doth proceed from the will and by the viſitation of God, not by any voluntary act of the party *.

[a] § Præterea. Inſtit. quibus non eſt permiſſum. L. furioſum. C. qui teſta. fac. poſſ. L. nec codicillos. C. de codicillis.
[b] Bar. in L. j. C. de ſacroſanc. Eccleſ. n. 16. Dec. in d. L. furioſum. & hæc opinio communiter eſt recepta. Jul. Clar. § teſtm. q. 5. Graſſ. § teſt. q. 17.
[c] Graſſ. d. § teſtm. q. 2. in prin.
[d] L. ſenium. C. qui teſta. fac. poſſ.
* Minſing. in d. § præterea. Inſtit. quibus non eſt permiſſ. quæ tamen clauſula non eſt adeo neceſſaria, ut ſemper obſervetur.
‖ P. 3 Jac. Camera Stellat. *Combes* Caſ. Moors rep. fol. 759. n. 1051.
[f] d. L. furioſum. C. qui teſta. fac. poſſ. d. § præterea. Inſtit. quibus non eſt permiſſum, &c.
[g] d. L. furioſum. & d. § præterea. & DD. ibid.
[h] d. Locis.
[i] Vide Dom. Coke, lib. 4. in caſu inter *Forſe* & *Hemblings*.
* Do. Coke ubi ſupra, lib. ult. ff. de injuſt. rupt. & irrit. teſt. Boer. niſi dudum. el. j. de elect. extr.

And

And here note, that (4) every perſon is preſumed to be of perfect mind and memory, unleſſe the contrary be proved *. And therefore (5) if any perſon go about to impugn or overthrow the Teſtament by reaſon of inſanity of mind, or want of memory, he muſt prove that impediment [k]. If it be asked, wherefore then is that uſuall clauſe *(of perfect mind and memory)* ſo duly obſerved in every Teſtament, if he that doth prefer the will be not charged with the proof thereof? It may be anſwered, that that which is notorious is to be alledged, not proved [l]. And ſo this being accounted notorious, (becauſe where the contrary appeareth not, the law preſumeth it,) it need not be proved [m]. And therefore I ſuppoſe that clauſe to be more uſuall then neceſſary, and yet not hurtfull [n].

* Bar. in L. nec codicillos. C. de codicil. Alciat. in Tract. de præſumpt. regula j. præſump. 78.

[k] Bar. in d. L. nec codicillos. Minſing. in d. § prærerea. Mantic. de conject. ult. vol. lib. 2. tit. 5.

[l] L. ſi adulterium. § idem. ff. de adul.

[m] Vaſ. de ſucceſſ. progreſſ. l. 1. § j. ubi contra Socin. & Boer. ſentientes, quod allegans mentis inſanitatem tenetur eandem probare, non dubitat hanc opinionem indignam tantis viris affirmare. Ego vero ſententiæ Vaſquii ſubſcribo, niſi conſtet teſtatorem ante fuiſſe furioſum. Vide Maſcar. de probac. concl. 824. n. 10, 11, 12, 13. [n] Immo prodeſt hujuſmodi clauſula, quoad probationis adminiculum, à Notario ſcripta. Mantic. de conject. ult. vol. lib. 2. tit. 5. in fin.

Seeing then he whoſe intent is grounded upon the madneſſe and lunacy muſt prove the ſame, it ſhall not be amiſs to ſet down ſome obſervations concerning the manner of proof thereof.

Firſt therefore, it may be delivered for a rule, That (6) it is ſufficient for the party which pleadeth the inſanity of the Teſtator's mind, to prove that the Teſtator was beſide himſelf before the making of the Teſtament, although he do not prove the Teſtator's madneſſe at the very time of the making of the Teſtament [o]. The reaſon is; It (7) being proved that the Teſtator was once mad, the law preſumeth him to continue ſtill in that caſe, unleſſe the contrary be proved [p]. For like as the law preſumeth every man to be an honeſt man, unleſſe the contrary be proved [q]; and being proved, then he which is evill, to be evill ſtill [r]: So concerning *furor*; the law preſumeth every man to have the uſe of reaſon and underſtanding, unleſſe the contrary be proved; which being proved accordingly, then he is preſumed in law to continue ſtill void of the uſe of reaſon and underſtanding †. Unleſſe the Teſtator were beſides himſelf but for a ſhort time, and in ſome peculiar actions, and not continually for a long ſpace, as for a month or more [t]; or unleſſe the Teſtator fell into ſome frenzy upon ſome accidentall cauſe, which cauſe is afterwards taken away [v]; or unleſſe it be a long time ſince the Teſtator was aſſaulted with the malady [x]. For in theſe caſes the Teſtator is not preſumed to continue in his former *furor* or frenzy [y].

[o] Gloſſ. in c. fin. de ſucceſſ. ab inteſtat. extr. Lanfranc. in c. quoniam contra. de probac. extr. verb teſtium depoſ. & eſt communis opinio per præpoſ. in c. dilectus. deſponſ. extr.

[p] Mantic. de conject. ult. vol. li. 2. tit. 5. Dec. in L. furioſum. C. Qui teſta. fac. poſ.

[q] Alciat. de præſump. reg. 2. præſump. 8.

[r] C. ſemel malus. de reg. jur. 6

† Panor. Jo. And. & Butr. in c. cum dilectus. de ſucceſſ. ab inteſtat. ext. quorum op. com. eſſe multis teſtimonijs probat Maſcard. de probac. verb. furioſum. concl. 825. n. 5. [t] Bar. in L. 2. de bon. poſſ. inſan. & furioſ. delat. Mantic. de conject. ult. vol. lib. 2. tit. 5. n. 7. verb. ſed tamen. [v] Are. in L. 2. ff. de teſta. Covar. in tract. de ſponſ. & matrim. 2. part. c. 2. n. 6. Mantic. ubi ſup. verb. tertio. [x] Bald. & alii in L. furioſum. C. qui teſta. fac. poſ. Covar. in d. c. 2. n. 6. [y] Paul. de caſt. in d. L. Furioſum. & Maſcard. de probac. verb furioſus, concl. 825.

Another obſervation is this, (8) That it is a hard and difficult point, to prove a man not to have the uſe or underſtanding of reaſon. And therefore (9) it is not ſufficient for the witneſſes to depoſe that the Teſtator

ſtator was mad, or beſides his wits; unleſſe they render or yield a ſufficient reaſon [z], to prove this their depoſition: as that they did ſee him to doe ſuch things, or heard him ſpeak ſuch words, as a man having wit or reaſon would not have done or ſpoken [a]; namely (10) they did ſee him throw ſtones againſt the windows [b], or did ſee him uſually to ſpit in mens faces [c], or being asked a queſtion they did ſee him hiſſe like a gooſe, or bark like a dog [d], or play ſuch other parts as mad folks uſe to doe. This or the like reaſon (whereby the Judge may be induced to eſteem the Teſtator not to be ſound of mind) ought the witneſſes to yield, although they be not interrogated of the cauſe of their knowledge *. And ſome (11) there be which hold this for a ſufficient reaſon in this caſe, if the witneſſe do ſay, I know he was mad, for I did ſee him mad, although he do not expreſſe any particular act whereby ſuch madneſſe may be collected [f]. Furthermore, (12) this *furor* or madneſſe may be proved by ſingular witneſs [g]; ſo that the witneſſes be not ſingular in time. For if one witneſs depoſe of the madneſs of the Teſtator at one time, and another witneſs of his madneſs at another time, this doth not ſufficiently prove that the Teſtator was mad [h]: But when the witneſſes agreeing in time, one depoſeth of one mad prank, another witneſs of another mad act at the ſame time, theſe prove that the Teſtator was then mad, though they do not both depoſe of one and the ſame mad act [i]. If ſome witneſſes do (13) depoſe that the Teſtator was of perfect mind and memory, and others depoſe the contrary; their teſtimony is to be preferred which depoſe that he was of ſound memory [k], as well for that their teſtimony tendeth to the favour and validity of the Teſtament [l], as for that the ſame is more agreeable to the diſpoſition of nature [m]; for every man is a creature reaſonable.

[z] Bald. in d. L. furioſum. Maſcard. tract. de probac. verb. furioſus. concl. 824. 827

[a] Paul. de caſtr. in d. L. furioſum. Boer. Deciſ. 23. Mantic. de conject. ult. vol. lib. 1. tit. 5. & Maſcard. d. concl. 827. Minſing. in § præterea. Inſtit. quibus non eſt permiſſum, &c.

[b] Bald. in L. Divus, ff. de offic. præfid. gloſſ. & DD. in L. ſi cum dotem. § ſin autem ſol. matr. Adhibe micam ſalis, ut per Mantic. d. tit. 5. n. 22. & per Dec. conſil. 448.

[c] Corn. conſil. 22. vol. 4. Mantic. d. tit. 5. n 12. Maſcard. de probac. concl. 826. n. 29.

[d] Maſcard. d. concl. 828. n. 28. Mantic. ubi ſupra, & Corn. conſ. 319.

* Paul. de caſtr. L. furioſum. C. qui teſta. fac. poſſ. Mantic. ubi ſupra. Boer. deciſ. 23. n. 4. Maſcard. de probac. concl. 827. n. 4. [f] Are. in L. ult. § ult. ff. de verb. ob. Boer. deciſ. 23. n. 44, 45. Mantic. d. tit. 5. lib. 2. n. 16. [g] Gabr. lib. 1. com. concluſ. tit. de teſtibus, concl. n. 43. poſt Alex. Pariſ. Dec. & alios ibi nominatos. [h] Quod procedit, ſive agatur de probatione furoris in ſpecie, ſive in genere, ubi tempus eſt de ſubſtantia actus. Ruin. conſil. 67. vol. 1 Maſcard. de probac. concl. 827. n. 9. [i] Maſcard. poſt Ruin. ubi ſupra. [k] Gabriel lib. 1. com. concl. tit. de teſtibus, concl. 4. n. 19. ubi ad hunc finem citat Jaſ. Corne. Socin. Dec. Graver. Boer. & alios: quibus adde Maſcard. d. concl. 827. n. 11. [l] Simo de Prætis de Inter. ult. vol. lib. 2. ſolu. 1. n. 19. [m] Idem ibid. n. 18.

The laſt obſervation is this, (14) If a Lunatick perſon, or one that is beſides himſelf at ſome times, but not continually, make his Teſtament, and it is not known whether the ſame were made while he was of ſound mind and memory, or no; then, in caſe the Teſtament be ſo conceived, as thereby no argument of frenzy or folly can be gathered, it is to be preſumed that the ſame was made during the time of his calm and clear intermiſſions: and ſo the Teſtament ſhall be adjudged for a good Teſtament [n]. Yea (15) although it cannot be proved, that the Teſtator uſeth to have any clear and quiet intermiſſions at all, yet nevertheleſſe I ſuppoſe, that if the Teſtament be wiſely and orderly framed, the ſame ought to be accepted for a lawfull Teſtament [o]. But

[n] Michael Graſ. Theſaur. com. op. § teſtm. q. 21. ubi atteſtatur hanc opin. eſſe com. Vaſq. de ſucceſſ. progreſſ. l. 1. § 1. n. 90. Vivius l. com. op. verb. teſtm. [o] Hanc opinionem communiter receptam eſſe contra Abb. & alios, refert idem Graſſ. d. q. 21. n. 4. Item Boer. q. 23. n. 88. veriorem etiam & magis com. affirmat. Joſeph. Ludo deciſ. 1. n. 13. Quinimo ne ab hac opinione recedas, monet Graſſ. ubi ſupra. Hippol. Marſil. ſing. 380. in fin.

(16) if

(16) if in the Teſtament there be mixture of wiſedom and folly, it is to be preſumed that the ſame was made during the Teſtator's frenzy [p]; inſomuch that if there be but one word ſounding to folly, it is preſumed that the Teſtator was not of ſound mind and memory when he made the ſame. And therefore in this caſe is the Teſtament void [q], unleſſe that it may be proved, that there was intermiſſion of *furor* the ſame time.

[p] Bald. & Angel. in L furioſum. C qui teſta. fac. poſſ.

[q] Idem Angel. in eadem L. furioſum.

§ IV. Of Idiots.

1. *What perſon is deemed an Idiot.*
2. *An Idiot cannot make a Teſtament.*
3. *He that is of a mean capacity, or indifferent betwixt a wiſe man and a fool, may make a Teſtament.*
4. *Although a man be not an Idiot, yet if he be ſo very ſimple, that there is but ſmall odds betwixt him and a naturall fool, ſuch a perſon cannot make a Teſtament.*
5. *What if an Idiot ſhould make his Teſtament wiſely and reaſonably to the ſhew? whether were that Teſtament good or not?*
6. *A pleaſant jeſt of a very fool, which gave a very wiſe ſentence.*
7. *Another jeſt of a fooliſh Magiſtrate.*
8. *A naturall fool doth not underſtand what he ſaith, although he ſeem to ſpeak wiſely.*
9. *A fool's Teſtament wiſely conceived is ſometimes good in law.*

AN Idiot [a] or a naturall fool is (1) he, who, notwithſtanding he be of lawfull age, yet he is ſo witleſſe, that he cannot number to twenty, nor can tell what age he is of [b], nor knoweth who is his father or mother, nor is able to anſwer to any ſuch eaſy queſtion [c]. Whereby it may plainly appear, that he hath not reaſon to diſcern what is to his profit or damage, though it be notorious; nor is apt to be informed or inſtructed by any other [d]. Such (2) an Idiot cannot make any Teſtament, nor may diſpoſe either of his lands * or goods [f]. And this appeareth by 3 Eliz. Dy. fol. 203, 204. where the caſe was, that Executors recovered in an action of account, and the defendant was taken in execution for the arrearages, and afterwards the Will was made void, becauſe the Teſtator was an Idiot; and thereupon the party ſued an *Audita querela*, upon which the Executors demurr'd. Vide C. lib. 8. fol. 143. in Doct. *Druryes* Caſe, where it is reſolved, that in ſuch caſe an *Audita querela* doth lie. But a lunatick having *lucida intervalla* may, in the time of his right mind, make a Will and Executors. 44 E. 3.

[a] Idiota apud Ciceronem & alios indoctum ſeu illiteratum plerunque ſignificat.

[b] Fitzh. Nat. Bre. de idiota inquirendo.

[c] Quid? eſtne ſtatim fatuus, quiſquis non poteſt demonſtrare patrem? Abſit. Nam, ut concedam filium illum merito ſagacem dici, ſuum qui novit patrem: certe ſi concluderem, reliquos omnes eſſe fatuos, vereor ne excluderem nō paucos. Notum eſt, quod cecinit de Telemacho inſignis Homerus, *Ex illo natum mater me dicit: at ipſe Neſcio: nam certum quis poſſit ſcire parentem?* Quod igitur ſcriptum reliquit Fitzherb. Que tiel perſon ſerra dit ſot & idiote, que ne ſcier dire que fuit ſon pere ou mere, &c. ita exaudiendum eſt, ſi neſciat reſpondere quis appellatur ipſius pater.

[d] Fitzh. ubi ſupra.

* Stat. H. 8. an. 34. c. 5.

[f] Sichard. in Rub. qui teſta. fac. poſſ. C. n. 6. Simo de Præt. de interp. ult. vol. li. 2. dub. 1. fol. 4.

fol. 33. The difference between an Idiot and a Lunatick Vide lib. 4. *Beverleys* Caſe. And (3) if a man be of a mean underſtanding, neither of the wiſe ſort nor of the fooliſh, but indifferent, as it were, betwixt a wiſe man and a fool, yea though he rather incline to the fooliſh ſort, ſo that for his dull capacity he might worthily be termed *Groſſum caput*, a dull-pate or a dunce; ſuch an one is not prohibited to make a Teſtament [g]: unleſſe he (4) be yet more fooliſh, and ſo very ſimple and ſottiſh, that he may eaſily be made to believe things incredible or impoſſible; as that an Aſſe can fly, or that in old time Trees did walk, Beaſts and Birds could ſpeak, as it is in *Æſop*'s fables. For he that is ſo fooliſh cannot make a Teſtament [h], becauſe he hath not ſo much wit as a child of ten or eleven years old, who is therefore inteſtable, (as the text witneſſeth,) namely, for want of judgment [i]. I do reade, that if one have ſo much underſtanding as he can meaſure a yard of cloth, or rightly name the days in the week, or beget a child, ſon, or daughter, he that can ſo doe, ſhall not be accounted an Idiot or naturall fool by the Laws of the Realm †. Which concluſion if it be true, to avoid ſome effects prejudiciall to the party ‖; yet nevertheleſſe unleſs he have ſome more underſtanding, namely to conceive what is the nature of a Teſtament or laſt Will, being well informed thereof, and the matter plainly delivered, I do not hold him, being deſtitute of ſuch underſtanding, fit to make a will *, although peradventure he could meaſure a yard of cloth, or rightly name the days in the week, or beget a Child. For the making of a will is an act requiring a greater meaſure of underſtanding, then to be able to perform any of theſe former actions, and eſpecially the laſt of the three †, being an act proceeding rather from inſtinct of nature, then from capacity of reaſon, and which brute beaſts, not capable of reaſon, can perform effectually ‖.

[g] Simo de Prætis ubi ſupra. Minſing. in § præterea. Inſtit. quibus non eſt permiſſ. &c.

[h] Simo de Prætis de interp. ult. vol. lib. 2. dub. 1. fol. 4. n. 21.

[i] Text. in d. § præterea. Inſtit. quibus non eſt permiſſ. teſta. fac.

† *Terms of law*, verb. *Idiot.* Stanford de prærogativ. regis c. 9.

‖ Viz. Ne ſit ſub cuſtodia regis, &c.

* Supra ead. part. § 3. in princ. & in prima part. § 3. n. 4. D. Coke lib. 6. in caſu *Paulet* le Marques de *Winchester*.

† L. 2. & L. q. 1. teſtament. de teſta. ff. L. 2. qui teſtamentum fac. poſſ. Cod. DD. ibid.

‖ Commune autem animantium omnium eſt conjunctionis appetitus, &c. Cic. lib. 1. Offic.

But (5) what if an Idiot or naturall fool ſhould make his Teſtament ſo well and wiſely, (in appearance) that the ſame may ſeem rather to be made by a reaſonable man, then by one void of diſcretion? Whether is this Teſtament good in law, or no? Surely ſome have been of this opinion, that ſuch a Teſtament is good and available in law [k]; becauſe Almighty God doth ſometimes ſo illuminate the minds of the fooliſh, that for that preſent, in that caſe, they are not much inferiour to the wiſe [l]. And (6) to this purpoſe divers credible writers do remember a merry accident, which (if they ſay truly) was no fable, but an undoubted fact [m]: and this is it.

[k] Ita fuiſſe deciſum in Senatu Romano commemorant Jo. And. & And. Barb. cum aliis in c. ad noſtram. de conſuetud. extr.

[l] Gloſſ. in d. c. ad noſtram. [m] Jo. And. Panor. Barba. & alii in d. c. ad noſtram. Hiero. Franc. in L. furioſi. de reg. jur. ff. Boer. deciſ. 23. n. 58. Mantic. de conject. ult. vol. l. 2. tit. 5. n. 8. Corſet. Sing. verb. Teſtamentum.

" At *Paris* one morning a hungry poor man, begging his alms from " door to door, did at the laſt eſpy very good chear at a Cook's houſe, " whereat by and by his teeth began to water; and the ſpur of his " empty and eager ſtomach pricking him forwards, he made as much " haſt

" haſt towards the place as his feeble feet would give him leave: where " he was no ſooner come, but the pleaſant ſmell, partly of the meat, " partly of the ſauce, did catch ſuch ſure hold of the poor man's noſe, " that (as if he had been faſt holden with a pair of pinſers) he had no " power to paſs from thence, untill he had (to ſtay the fury of his ra- " ging appetite) eaten a piece of bread which he had of charity gotten " in another place. In the eating whereof, his ſenſe was ſo delighted " with the freſh ſmell of the Cook's cates, that albeit he did not lay his " lips to any morſell thereof, yet in the end his ſtomach was ſo well ſa- " tisfied with the onely ſmell thereof, that he plainly acknowledged " himſelf thereby to have gotten as good a breakfaſt, as if he had indeed " there eaten his belly full of the beſt chear. Which when the Cook " had heard, being an egregious wrangler and an impudent compani- " on, what doth he but all in haſt ſteps forth to the poor fellow, lays " faſt hand upon him, and in a hot cholerick mood bids him pay for his " breakfaſt? The honeſt poor man, half amazed at this ſtrange demand, " wiſt not well what to ſay: but the Cook was ſo much the more fierce " and earneſt, by how much he perceived the good man to be abaſhed " at his boldneſs; and did ſo cunningly cloak the matter, that in the " end the poor man was contented to refer the deciding of the contro- " verſy to whatſoever perſon ſhould next paſs by that way, and with- " out any more adoe to abide his judgement. Which thing was no " ſooner concluded, but by and by cometh to the place a very naturall " fool, and ſuch a notorious Idiot, as in all *Paris* his like was not to " be found. All the better for me, thought the Cook; for more he doubted " the ſentence of a wiſe man then of a fool. Well, ſir, to this foreſaid " Judge they rehearſed the whole fact; the Cook cruelly complaining, " and the other patiently confeſſing as before. A great multitude of " people were gathered about them, no leſs deſirous to know what " would follow, then wondring at that which had gone before. To " conclude, this Naturall perceiving what money the Cook exacted, " cauſed the poor man to put ſo much money betwixt two Baſons, and " to ſhake it up and down in the Cook's hearing: which done, he did " arbitrate and award, that as the poor man was ſatisfied with the " onely ſmell of the Cook's meat, ſo the Cook ſhould be recompenſed " with the onely noiſe of the poor man's money. Which judgement " was ſo commended, that whoſo heard the ſame, thought, if *Cato* " or *Solomon* had been there to decide the controverſy, they could not " have given a more indifferent or juſt ſentence.

The like (7) caſe is reported to have happened at *Bononia* [n]. " There " a certain covetous man loſt his purſe, with 21 Ducats in it; which " when he could not recover with diligent ſearch, he fared like a mad- " man, and in the end was ready to have hanged himſelf for ſorrow. " Another honeſt man having found ſuch a purſe, moved with com- " paſſion, came and delivered the ſame to this covetous perſon; who " never thanking the bringer, fell forthwith to telling of the money, and " finding but 20 Ducats therein, with great greedineſs he exacted the " odde Ducate: which becauſe the finder denied, he is brought before

[n] And. Barba. in d. c. ad noſtram. de conſuetud. extr. n. 8.

"the Magiſtrate, a man of very great wealth, but of very little wit. "(But ſuch Magiſtrates are many times elected, where the matter "lieth in the mouths of the multitude.) The one party ſweareth, "that there were 21 Ducats in the purſe which he loſt. The other "party ſweareth, that there were but 20 Ducats in the purſe which he "found. The Magiſtrate, although a fool, giveth no fooliſh ſen- "tence: for he pronounced that the purſe which was found, was not "that purſe which was loſt; and therefore condemned the covetous "perſon to reſtore the 20 Ducats to the other party.

By theſe reaſons and examples therefore it may be reaſonably inferred, that if a fool do make a wiſe and reaſonable Teſtament, the ſame ought tobe allowed as lawfull.

Nevertheleſs this is the truer opinion, that ſuch a Teſtament is not good in law [o]. The reaſon is, becauſe a Teſtament is an act to be performed with diſcretion and judgement [p]. But (8) a naturall fool, by the generall preſumption of Law, doth not underſtand what he ſpeaketh, though he ſeem to ſpeak reaſonably [q]; no more then did *Balaam*'s Aſſe [r], when he reaſoned with his Maſter; or doth a Parrat, ſpeaking to the paſſengers [*]. And although almighty God do ſometimes ſo illuminate the minds of very naturall fools and Idiots, that they do well perceive and underſtand what they ſpeak: yet becauſe this thing happeneth but very ſeldom, the Law doth not preſume the ſame by occaſion of words onely [†]. And therefore unleſs farther proof be made thereof by other circumſtances, the Law doth not approve ſuch Teſtaments.

Indeed, (9) if it may appear by ſufficient conjectures, that they had the uſe of reaſon or underſtanding at ſuch time as they did make their Teſtaments, then doth the former opinion take place, that ſuch Teſtaments are good in Law [t].

[o] Jaſ. & Dec. in L. furioſi. C. qui teſta. fac. poſſ.
[p] Supra prim. part. § 3. verb. Senten.
[q] Dec. in d. L. furioſum. C. qui teſta. fac. poſſ. lim. 3.
[r] Num. c. 22. verſ. 28. 2 Pet. c. 2. verſic. 16.
[*] Roman. ſing. 52. Cagnol. in L. Librarius. ff. de reg. jur. n. 2.
[†] Dec. in d. L. furioſi. & in L. in negotiis. de reg. jur. ff. Mantic. de conject. ult. vol. l. 2. c. 5. n. 11.
[t] Dec. in d. L. In negotiis. & in Hiero. Franc. in d. l. furioſi. de reg. jur. ff. Mantic. de conject. ult. vol. lib. 2. c. 15. Hyppol. de Marſil. Sing. 380. in fin.

A Teſtator at the making of his Will ought to be of a memory, not onely to anſwer to ordinary and familiar queſtions, but alſo to have a diſpoſing memory, ſo as to be able to make a diſpoſition of his lands with reaſon and underſtanding; and that is ſuch a memory which the Law calls *Sana memoria*. T. 31 Eliz. B. R. C. lib. 6. fol. 23. the Marqueſs of *Wincheſter*'s Caſe.

§ V. Of

§ V. Of Old men.

1. *Age alone doth never deprive a man of the power of making a Teſtament.*
2. *He that by extreme old age is become a child in his underſtanding, cannot make a Teſtament.*
3. *He that hath loſt his memory cannot make a Teſtament.*

ALbeit (1) Old age alone doth not deprive a man of authority and power of making a Teſtament [a]: (for a man may freely make his Teſtament how old ſoever he be; for it is not the integrity of the body, but of the mind, that is requiſite in Teſtaments [b]:) yet (2) if a man in his old age do become a very child again in his underſtanding [c], (which thing doth happen to divers perſons, being as it were worn away with extreme age, and deprived not onely of the uſe of reaſon, but of ſenſe alſo almoſt,) ſuch a perſon can no more make a Teſtament then a child [d].

So it is, (3) if a man, either by reaſon of age, or ſome other infirmity, become ſo forgetfull, that he hath forgotten his own name *: (which thing alſo hath happened to divers wiſe and learned men:) becauſe for any act which is to be performed with diſcretion, he is no more fit then a fool or an Idiot [f], of whom we have ſpoken already.

[a] L. ſenium.C.qui teſta.fac.poſſ.
[b] d.L.Senium.
[c] Simo de Prætis de inter.ult.vol.l.2.dub. 1.ſoluc.4.n.22.
[d] Ibidem.
* L. fin.C. de hæred. Inſt.
[f] Bald. in d. L. fin. Mantic. de conj. ult. vol.l.2.tit.15.n.16.

§ VI. Of him that is Drunk.

1. *Whether he that is drunk may make a Teſtament.*

HE (1) that is overcome with drink, during the time of his drunkenneſs, is compared to a mad man; and therefore if he make his Teſtament at that time, it is void in Law [a]. Which is to be underſtood, when he is ſo exceſſively drunk, that he is utterly deprived of the uſe of reaſon and underſtanding. Otherwiſe, if he be not clean ſpent, albeit his underſtanding be obſcured, and his memory troubled, yet may he make his Teſtament being in that caſe [b].

[a] Vaſqui. de ſucceſſ. crea.lib.2.§13.requiſ. 7.n.8. Simo de Prætis de inter.ult.vol.lib.2. dub.1.ſoluc.4.n.22.
[b] Iidem Vaſq.& Simo de Prætis ubi ſupra.

§ VII. Of Slaves and Villains.

1. *Of all men the Slave is in greateſt ſubjection.*
2. *What is a Slave.*
3. *A Slave hath neither lands nor goods, for both are his Lord's.*
4. *Whether the children of bond-parents be ſubjecti to ſervitude.*
5. *By the Civill Law the child is free, if the mother be free, notwithſtanding the bondage of the father.*

6. *By the Laws of this Realm the Child is free-born whoſe father is free, though the mother be a bond woman.*
7. *No Baſtard is born a Slave, though the Father be a bond-man.*
8. *A Bond-man cannot make a Teſtament.*
9. *Of the difference betwixt a Bond-ſlave and a Villain.*
10. *A Villain like unto him which is called in the Civill Law* Aſcriptitius Glebæ.
11. *Whether a Villain may make a Teſtament.*
12. *The Lord may take from his Villain whatſoever he hath, life excepted.*
13. *The Teſtament of the Villain is not void, but voidable.*
14. *Sometimes the Lord cannot make void the Teſtament of his Villain.*
15. *The Prince may at any time make void the alienation or gift of his Villain, and conſequently his Teſtament.*
16. *What manner Villains be here meant?*
17. *A Villain Executor may make a Teſtament.*
18. *A Villain Executor may maintain action againſt his Lord.*
19. *The reaſon of the former concluſion.*

OF all (1) men which be deſtitute of liberty or freedome, the Slave is in greateſt ſubjection: for a (2) ſlave is that perſon which is in ſervitude or bondage to another, even againſt nature [a]. Neither (3) hath he any thing of his own, but whatſoever he poſſeſſeth, all is his Lord's [b]. Not onely lands, goods and chattels, and generally whatſoever he getteth, either by his own induſtry, or by the gift of others, or by any other means [c]: but (4) even his children alſo are infected with the Leproſie of his father's Bondage [d].

[a] § Servitus. Inſtit. de jure perſonarum. Et dicitur Latine ſervus, non à ſerviendo, ſed à ſervando; propterea quod ſervandi, non occidendi, ſunt à dominis. Nam cum antiquitus multi ſæviiſſent in captivos, eoſq; necaſſent, prohibitum id fuit, conſtitutumq; ut potius venderentur quam occiderentur. Et inde à ſervando nomen mutuarunt ſervi. § ſervi autem. Inſtit. de jure perſonarum. [b] § in poteſtate. Inſtit. de his qui ſui vel alie. jur. [c] § iterum. Inſtit. per quas perſonas. [d] Bracton de legib. & conſu. Ang. lib. 1. c. 6. Principall grounds, fol. 44.

And although by (5) the Civill Law, the wife being a free-woman, the children are likewiſe free, *Quia partus ſequitur ventrem* [*]; inſomuch that if the mother be free either at the conception or at the birth of the child, or in the mean time, by the ſame Civill Law that child ſhall be free, notwithſtanding the bondage of the father [f]; yet (6) it is otherwiſe by the Laws of the Realm, for the child doth follow the ſtate and condition of the father: and therefore in *England* the father being a bond-man, the child ſhall be in bondage, without diſtinction whether the mother be bond or free [g]; ſo that the child be begotten or born in lawfull matrimony. But (7) a baſtard ſhall not be bound, though the father were a bond-ſlave [h], becauſe the Law doth not acknowledge any father in this caſe: for by the Law a baſtard is ſometimes called *filius nullius*, the ſon of no man; ſometimes *filius vulgi*, the ſon of every man [i]. But howſoever the Civill Law and the Laws of this

[*] § Sed etſi. Inſtit. de ingenuis. [f] Eod. § ſed etſi. [g] Bracton de leg. & conſ. Ang. lib. 1. c. 6. [h] Bracton ubi ſupra. Principall grounds, fol. 44. [i] Cui pater eſt populus, pater eſt ſibi nullus, & omnis. Cui pater eſt populus, non habet ipſe patrem. gloſſ. in § pen. Inſt. de nuptiis.

Realm

Realm differ in this, whether the bondage of the father or of the mother do make the child bound: yet in (8) this they do agree, that a bondman cannot make a Teſtament [k].

[k] L. Lib. de petic. hæred. l. ſervus, Comm. de ſucceſſ. C. Vaſq. de ſucceſſ. progreſſ. lib. 1. § 3. ubi multis ampl. hanc propoſitionem ornat.

A Villain (9) howſoever he may ſeem like unto a Slave, yet his bondage is not ſo great: for whatſoever a bond-ſlave getteth, by and by it is his Lord's, albeit ignorant and unwilling [l]; not onely in reſpect of property, but alſo in reſpect of poſſeſſion: for whatſoever a bond-ſlave doth poſſeſs, he doth alſo poſſeſs it for his Lord [m]. But it is not ſo with a villain: for the Lord hath no title to the goods of his villain before ſeiſin; nor any title to his lands before entrie: nor any title to any rent, reverſion, common, or the advowſement of a Church belonging to the villain, but by claim [n]. And ſo the villain in the mean time hath perfect property therein [o]. And therefore (10) a villain is more like unto him which in the Civill Law is call'd *Aſcriptitius Glebæ* [p], (that is to ſay, one that is aſcribed or aſſigned to a ground or farm, for the perpetuall tilling or manuring thereof [q],) then to a ſlave.

[l] § Item nobis. Inſt. per quas perſonas.

[m] Eod. §. Item ibi, non ſolum.

[n] Perkin. tit. Grant, fol. 6. Brook Abridg. tit. Villenage. Doct. & Stud. lib. 2. c. 43.

[o] Doct. & Stud. c. 43. lib. 2.

[p] Aſcriptitius Glebæ, id eſt adſcriptus prædio. Spieg. Lexicon.

[q] Quemadmodum enim Aſcriptitius vere ſervus non eſt, ſed ſervili tantum macula aſperſus, Ibid. in L. cum precum. C. de l. cauſa; & ſicut qui aſcribitur glebæ, ſeu prædio perpetuo colendo, nunquam inde recedere debet; vel ſi aufugiat, ad antiquos penates nempe ubi natus eſt, redire compellitur, L. omnes de Agricul. cenſit. l. 11. C. Eodem prorſus modo iſti quos *Villeins* appellat vulgus, licet non ſunt proprie ſervi; perpetuæ tamen prædii culturæ aſtringuntur, nunquam inde receſſuri invito vel ignorante domino. Quod ſi anfugiunt, conceditur ſtatim Breve, quod dicitur de Nativo habendo. Fitz. Nat. Bre.

If you will (11) underſtand whether a villain may make his Teſtament or not: we muſt (12) note, that whatſoever villains have of their own, be it lands or goods, the Lord may by entry or ſeiſing take and enjoy the ſame as his own [r]; onely he may not ſlay or maim his villain †. And therefore (13) if the villain make any deviſe of lands or goods, the Lord may before the approbation of the will, or apprehenſion of the goods by the Executor, enter to thoſe lands and ſeiſe thoſe goods, or ſome parcell thereof in the name of the whole, and by that means make void the gift or deviſe of the villain [t]. The will is alſo void though the Lord do not really ſeiſe any goods of his villain, in caſe he did claim the villain in his life-time, and by words onely did ſeiſe his goods; for then the Executor ſhall not have them, but the Lord of the villain [v].

[r] Brook Abridg. tit. Villenage. Perkins tit. Grants, fol. 6. Littleton tit. Villenage. *Terms of Law*, verb. *Thene.*

† Old tenures, tit. villen.

[t] Doct. & Stud. lib. 2. c. 43.

[v] Brook tit. Villen. n. 30.

But if (14) the will be approved before the Ordinarie, and by him approved, and the Executors (by virtue of the ſame will or deviſe) enjoy or poſſeſs the ſame lands or goods accordingly; then I ſuppoſe the Lord may not enter to ſuch lands or ſeiſe thoſe goods, no entrie, ſeiſing or claim being made before [x]. For if a villain purchaſe lands, and

[x] Brook eodem tit. n. 73. Doct. & Stud. li. 2. c. 43. Adde quod Aſcriptitius poteſt teſtm. facere. Spec. de Inſtr. edi. § compendioſe. Lindw. in c. ſtatutum. verb. Aſcriptitiorum. de teſta. lib. 1. provincial. conſti. ut. Cant.

alieneth the ſame to another, before his Lord enter; then the Lord may not enter afterwards, but it ſhall be imputed to his own folly, that he entred not when the Lands were in the villain's hands [y]. And ſo it is of other goods, which if the villain ſell or give to another before the Lord do ſeiſe them, the ſale or gift is good, and the Lord cannot afterwards have the ſame [z].

[y] Littleton tit. villenage.

[z] Ibidem.

Nevertheleſs if the (15) Prince have any villain which purchaſeth lands, and alieneth the ſame before the Prince do enter; yet may the Prince at any time after enter unto the lands to whom ſoever the ſame do come [a]. And likewiſe if the Prince's villain ſell or give any goods, yet may the Prince at any time after ſeiſe thoſe goods in whoſe hands ſoever they do remain [b]; for the Prince is not prejudiced by any courſe of time. And therefore I do collect, that if the Prince's villain ſhould by Teſtament diſpoſe either lands or goods, the Prince (notwithſtanding the approbation of the ſame Teſtament, and execution thereof,) might enter to the Lands, and ſeiſe the goods ſo deviſed or diſpoſed, in whoſe hands ſoever the ſame were [c].

[a] Littleton ubi ſupra.

[b] Ibidem.

[c] Arg. à contract. ad ult. vol. de quo Olden. Topic. Legal. loco à contract.

Note that (16) what I have here ſpoken of villains, is not to be underſtood of ſuch perſons as onely hold lands in villenage, being themſelves no bond-men, but free, (for divers perſons hold by tenure in villenage, and yet be no villains themſelves [d];) but of ſuch as both hold by villenage and are villains alſo. For theſe are they whoſe Teſtaments or laſt Wills are voidable, ſaving, as before, where the will is proved, and the Executor or Legatary poſſeſſed of the things deviſed: and ſaving where (17) the villain is Executor to another perſon; for being Executor himſelf, he may appoint another Executor, who ſhall have thoſe goods which the villain had as Executor, and not the Lord of the villain [*]. For if the (18) villain himſelf were living, the Lord could not take from him ſuch goods as he hath as Executor to another man; and if he did, his villain might bring an action againſt him for the ſame, and recover both the goods and damages [f]. The (19) reaſon is, becauſe that which the villain hath as Executor, he hath it not to his own uſe [g]; but is to be imployed in the behalf of the Teſtator, as to the paiment of his debts and Legacies, and to other godly uſes: as appeareth more at large in the office of an Executor [h].

[d] Brook, Littleton, Old tenures, tit. villenage.

[*] Brook tit. villenage, n. 73.

[f] Brook tit. villenage, n. 68.

[g] c. Statutum. § nullus. de teſta. lib. 3. provinc. conſtitut. Cant. & infra part. 6. § j.

[h] Infra 6. part. § j. § iij. § xvj. § xxj.

§ VIII. Of Captives and Priſoners.

1. *A Captive, during his captivity, cannot make a Teſtament.*
2. *If the Captive eſcape, whether the Teſtament made during his captivity be good.*
3. *What if the Teſtament were made before he were captive?*
4. *What if the Teſtator be taken captive by ſome Pirate, Turk, Infidel, or Chriſtian, when war is not proclaimed?*
5. *Whether he may make a Teſtament who is condemned to perpetuall priſon.*

6. *What*

6. What if the Teſtator be impriſoned for debt?

HE (1) that is taken captive by the enemy, during his captivity cannot make a Teſtament [a]: Inſomuch that (2) if afterwards he do eſcape, yet the Teſtament made whiles he was with the enemie is void [b]. But if (3) his Teſtament were made before his captivity; then, after his eſcape, the Teſtament is of like force as if he had not been captive [c]. Likewiſe if the Teſtament were made before he were apprehended, and the Teſtator die in captivity; yet is the Teſtament allowed, and the Executor by force thereof is to have all his goods here within this Realm of *England*, as if he had died the day before his captivity [d]. Likewiſe (4) if any perſon be taken as captive by any Pirate, Turk, Infidell, or Chriſtian, where war is not proclaimed; he that is ſo taken remaineth ſtill a free-man: and therefore if he make his Teſtament whiles he is ſo detained, the Teſtament is good and lawfull [*]. If a (5) lay-man be condemned to perpetual priſon for ſome offence, it ſeemeth that he cannot make a Teſtament [f]. But if (6) any perſon be impriſoned for debt, ſuch impriſonment being ordained for ſafety, not for puniſhment, he is not thereby diſabled to make his Teſtament [g]; ſaving that the Teſtament is not good, when it is made in his favour at whoſe ſuit the Teſtator is impriſoned, of intent to extort the ſame [h].

[a] L. ejus qui apud hoſtes. ff. de teſta.
[b] Ead. L. ejus.
[c] L. ratio. ff. de captivis. Graſſ. Theſaur. com. op. § teſtm. q. 25. ubi hanc opinionem communiter approbatam oſtendit.
[d] L. lege Cornelia. ff. de teſta.
[*] L. qui à latronibus. ff. de teſta.
[f] Panor. in Rub. de teſtm. ext. Graſſ. Theſaur. com. op. § teſtm. q. 28. cui tamen opinioni, quantumvis communi, non acquieſcit Clar. § teſtm. q. 23.
[g] Bald. in L. 1. C. ſi quis aliq. teſtari prohib. n. 5.
[h] L. Qui carcerem. ff. quod me cauſ. Mantit. de conject. ult. vol. lib. 2. tit. 7. n. 2.

§ IX. Of a Woman covert.

1. *A married woman cannot make her Teſtament of lands.*
2. *Eſpecially not to her husband, and wherefore.*
3. *What if ſhe be not conſtrained, but doth deviſe the ſame freely of her own accord?*
4. *What if the Teſtament be made before marriage?*
5. *What if the Teſtament being made during marriage, ſhe over-live her husband?*
6. *Certain caſes wherein the deviſe of lands is good, notwithſtanding the coverture of the Teſtatrix.*
7. *A Wife cannot make her Teſtament of goods, without her husband's licence or conſent.*
8. *The reaſon wherefore the wife cannot make her Teſtament of goods, without her Husband's licence or conſent.*
9. *Whether it be neceſſary that this licence or conſent ſhould goe before the making of the will, or concurre, or may follow.*
10. *Whether and when the husband may revoke the licence given to his Wife.*
11. *Certain caſes wherein the wife may make her Teſtament without her husband's conſent.*
12. *Whether an Empreſſe or a Queen may make a Teſtament without the conſent of the Emperour or King.*

13. *Of*

13. *Of that which is due to the wife, whereof the husband was never poſſeſſed, ſhe may make her Teſtament without his conſent.*
14. *A woman contracted in Matrimony, if the marriage be not ſolemnized, may make her Teſtament.*
15. *A wife being Executrix, may make an Executor to the former Teſtator without her husband's conſent.*
16. *The reaſon of the former poſition.*
17. *Whether a wife being Executrix may make her husband Executor in her place.*
18. *A wife Executrix may not give away the Teſtator's goods by her will.*
19. *A wife both Executrix and Legatary cannot make a teſtament of that which ſhe did accept, not as Executrix, but as Legatary.*
20. *The reaſon wherefore an Executor cannot diſpoſe the Teſtator's goods by Legacies.*
21. *The reaſon wherefore a wife Executrix and Legatary may not make her Teſtament of that which ſhe did accept as Legatary.*
22. *Whether ſhall the wife, which is both Executrix and Legatary, be deemed to have accepted of the Teſtator's goods as Executrix or Legatary.*
23. *Whether the wife being licenſed to make her Teſtament, may make any moe wills then one.*

A Married (1) woman, by the Laws and Statutes of this Realm, cannot make her Teſtament of any Mannors, Lands, Tenements or Hereditaments [a]. This concluſion is diverſly enlarged: and firſt, ſhe (2) cannot deviſe the ſame to her husband [b]. The equity of which prohibition (if I may be ſo bold with the good favour of our temporall Lawyers, to inſert the reaſon and conſideration of the civill Law,) is not obſcure. For if this gap were left open, few children ſhould ſucceed in the mother's inheritance [c]. But by how much the husband were more cruell, and the wife more timorous; he crafty, ſhe credulous; by ſo much the more were the lawfull heir in danger to be diſherited, and the cruell and deceitfull huſband in hope to be unworthily enriched and advanced. Wherefore if the wife ſhould deviſe any her Mannors, Lands, Tenements or Hereditaments, or any part thereof, to her husband; this deviſe were void, becauſe the ſame is preſumed to have been made by the conſtraint of the husband, or other ſiniſter means [d]. Secondly, albeit (3) it did appear by due proof, that the husband did not conſtrain his wife thereunto; but that ſhe of her own accord or free motion did make any ſuch deviſe, either to her husband, or to any other perſon by his conſent: yet is not the deviſe good *, as well becauſe the words of the Statute are generall, (and where the Law doth not diſtinguiſh, there may not we diſtinguiſh [f],) as for divers other reaſons grounded on the common Laws of this Realm. Thirdly, (4) albeit the Teſtament be made before the Marriage, yet ſhe being inteſtable

[a] Stat. H. 8. an. 34. c. 5. 31 E. 3. deviſe 12. M. 30, 31 Eliz. Forſe and Hemblings caſ. lib. 4. fo.

[b] Brook Abridg. tit. deviſe, n. 32, 34.

[c] L. 1, 2, 3. ff. de donac. inter vir. & ux.

[d] Brook ubi ſupra.

* Ita ſæpius accepi à nonnull. hujus regni juriſperitis non vulgaribus, quos ipſe velim conſulas.

[f] L. precio. ff. de public. in rem. action.

at

at the time of her death, by reaſon her husband is then living, the Teſtament is void [g]: for it is neceſſary to the validity of a Teſtament, that the Teſtator have ability to make a Teſtament, not onely at the time of the making thereof, when the Teſtament receiveth his eſſence or being; but alſo at the time of the Teſtator's death, when the Teſtament receiveth his ſtrength and confirmation [h]. Fourthly, albeit (5) the wife do over-live the husband, yet the Teſtament made during the Marriage is not good [i]: the reaſon is yielded before, becauſe ſhe was inteſtable at the time of the Will making [k]. But (6) if the Teſtament being made during the coverture, ſhe do approve and confirm the ſame after the death of her husband; in this caſe the deviſe is good, by reaſon of her new conſent, or new declaration of her Will [l]. What if the Teſtament be made before the Marriage, and ſhe over-live her husband? whether in this caſe is the Teſtament good or not? By the civill Law it is of as great force as if ſhe had not been married at all [m]: and ſo I am informed that it is by the Laws of this Realm [n]. Nevertheleſs I ſhall willingly refer thee to the learned profeſſours thereof. Thus much of the deviſe of Lands.

[g] Arg. § alio. Inſtitu. quib. mod. teſta. infir.

[h] d. § alio. & § non tamen. Inſtitut. quib. mod. teſta. infir. L. § exigit. ff. de bon. poſſ. ſecundum tab. Porcus in § in extraneis. Inſtit. de hæred. qual. &c.

[i] c. Non firmatur. de reg. jur. 6. L. 1. § j. de leg. 3.

[k] Arg. § præterea. Inſtit. quib. non eſt permiſſ. teſta. fac. verb. nec ad rem. Plowd. in caſ. inter Bret & Rigden, fol. 344.

[l] L. 1. § j. de leg. 2. ff. & ibi Paul. de caſtr. & alii. [m] d. § non tamen. & § pen. verb. denique. Inſtit. de mil. teſta. [n] Plowd. in caſ. inter Bret & Rigden, f. 343. M. 30 & 31 Eliz. C. B. Forſe & Hemblings caſe. C. tit. 4. fo. 60. b.

Of (7) goods or chattels the wife cannot make her Teſtament, without the licence or conſent of her husband [o], (except in certain caſes hereafter ſpecified [p];) (8) becauſe by the Laws and cuſtoms of this Realm, ſo ſoon as a man and a woman be married, all the goods and chattels perſonall that the wife had at the time of the ſpouſals, or celebration of the Marriage, or after [r], and alſo the chattels reall, if he over-live his wife, belong to the husband, by reaſon of the ſaid Marriage †: and therefore with good reaſon ſhe cannot give that away which was hers, without the ſufferance or grant of the owner [t]. Notwithſtanding upon licence or conſent of the husband the wife may make her Teſtament, even of his goods [v]. And albeit (9) the nature of a licence is to goe before the act [x], and the property of authority, or authorizable conſent, is to concur with the act [y]: yet by the Laws of this Realm, if a wife make a Teſtament of her husband's goods, the husband not underſtanding thereof, and after her death the Executors prove the ſame, if the husband deliver the goods deviſed in the will to the Executors, thereby he hath made the Teſtament good, notwithſtanding he were not privy to the making thereof [z]; becauſe in this caſe the ſame Law preſumeth, that the husband gave his conſent in the beginning at the time of the Will making. And therefore the ſame being proved, and the goods delivered accordingly,

[o] Bracton de leg. & conſu. Ang. lib. 2. c. 26. Brook tit. deviſe, n. 34. & in tit. teſtam. n. 21. Lindw. in c. ſtat. verb. propriorum. de teſta. lib. 3. provincial. conſtitut. Cant. cui tamen hoc durum videtur. H. 29 Eliz. C. B. Ognels caſ. lib. 4. fo. 51. b. 3 E. 3. tit. deviſe 12. lib. 4. fo. 61. a.

[p] Hoc ipſo §. n. 11. cum ſequen.

[r] Tract. de rep. Ang. l. 3. c. 6. Doct. & Stud. lib. 1. c. 7.

† Doct. & Stud. l. 1. c. 7.

[t] L. id quod noſtrum. de reg. jur. ff. c. filius. de teſta. extr.

[v] Lindw. in d. c. ſtatutum. ver. propriorum.

de teſt. l. 3. provinc. conſtit. Cant. Bract. d. l. 2. c. 26. Brook tit. deviſe, n. 24. [x] Phil. Franc. in c. Ratishibitio. de reg. jur. 6. [y] Tiraquel. de legib. Connub. gloſ. 4. in prin. Imo licet jure Civili Conſenſus pro forma requiſitus debet præcedere; ſecus eſt jure Canonic. Beron. in Rub. de jure pa. n. 67. [z] Perkin. tit. deviſe, c. 8. fol. 97. Tiraquel. ubi ſupra.

it is then too late for him to revoke the ſame [a]. Albeit otherwiſe, if (10) the husband do give licence to his wife to make a Will of his goods, yet he may revoke the ſame, not onely at the making of the Will, but after her death, at the leaſt before the Will be proved [b].

The (11) caſes wherein a wife may make a Teſtament of goods and chattels, without her husband's licence or conſent, are theſe. Firſt, I ſuppoſe that (12) an Empreſſe or a Queen may make her Teſtament without the licence of the Emperour or King her husband; ſo that it be not in prejudice of her ſaid husband [c]. The ſecond caſe is, when any thing (13) is due unto the wife, whereof ſhe was not poſſeſſed during the marriage: for it ſeemeth that ſhe may make her Teſtament thereof, and that ſhe may make her husband Executor in that caſe [d]. Neither can the husband bequeath by Will, or make an Executor of an Obligation which he hath in right of his wife, nor of any other thing in action †. But if the Obligation be theirs both joyntly, then he may deviſe the ſame by his Will, or make an Executor thereof ‖. Thirdly, if (14) a man and a woman be contracted together in Matrimony, and the woman die before the Eſpouſals or Celebration of the Marriage; albeit the Law doth often call this woman, thus betrothed and aſſured, by the name of wife, becauſe of the certain hope of Marriage ſhortly to be ſolemnized, whereby ſhe ſhall become a wife *; yet I take it for a clear caſe, that the woman ſo dying may make her Teſtament without his agreement to whom ſhe was contracted in Matrimony [f]. Fourthly, (15) if the wife be executrix to another man, ſhe may make her Teſtament without the licence of her husband [g]. The reaſon (16) is, becauſe ſuch goods as ſhe hath as executrix are not her husband's, but are to be diſtributed for the dead; as for the payment of his debts, performance of his will, and for ſuch other good and godly purpoſes [h]: and therefore if the executrix ſhould make no executor, but die inteſtate, adminiſtration might be obtained of the goods not adminiſtred by the next of kin of the Teſtator deceaſed [i], (for where an executor dieth inteſtate, the Teſtator from that time is eſteemed to die inteſtate [k]:) ſo far is it from the husband to have any of thoſe goods whereof his wife is Executrix. Much like unto that Lord whoſe villain is executor, in which caſe he cannot take from his villain that which did belong to the Teſtator; but his villain may have an action againſt him for the ſame, and may recover both the goods and the damages, (as hath been ſaid before [l].) Although otherwiſe whatſoever doth appertain to the villain, the Lord may take the ſame from him, and (as our common Lawyers term it) may even rob his vil-

[a] Perkins ubi ſupra.

[b] Brook Abridg. tit. deviſe, n. 34.

[c] De Auguſta & Regina, an & quando exemptæ ſunt à legibus vel ſtatutis, quibus cavetur, ne uxor teſtamentum condere valeat ſine mariti conſenſu, videre eſt apud Peckium, in præclaro ſuo tractat. de teſtam. conjug. l. 3. c. 26. Kitchin fol. 1. 3 H. 7. fo. 14. 49 E. 3. 4. 18 E. 1. 3.

[d] Brook Abridg. tit. teſtam. n. 11. Fitzher. Abridg. tit. executor, n. 109. Apologie for ſundrie proceedings Eccleſiaſticall, parte 1. c. 3. in fin. 12 H. 7. 22, 23, 24. 39 H. 6. 27. M. 32 & 33 Eliz. rot. 428 Sr Moyle Finch verſ. Finch. Moores rep. fo. 339. c. 459. 2 E. 2. Fitz. Deviſe 24. 3 E. 3. Deviſe 12. 18 E. 4. fo. M. 8 Jac. Graunts caſ. Rolls abridgment, tit. Deviſe.

† Lib. qui inſcribitur Labridgment dez caſes, edit. 1599. Incerto autore. 7 H. 6. fol. 2.

‖ Ibid. 16 E. 4.

* Covar. de ſponſal. 2. part. c. 1. n. 4. Peckius de teſtam. conjug. l. 4. c. 5.

[f] Perkins tit. feoffment, c. 3. fol. 40. quod verum eſt jure hujus regni. Cæterum attenta legiſtarum opinione communi, ſi ſtatuto caveatur, ne quid conjuges invicem relinquere poſſint, intelligitur etiam de ſponſis. Peckius tract. de teſta. conjug. lib. 4. c. 11.

[g] Fitzherb. Abridg. tit. exec. n. 10. Brook eod. tit. n. 11. Perkins tit. deviſe, c. 8. fol. 97. M. 32 & 33 Eliz. rot. 428. Sr Moyle Finch verſ. Finch. Moors rep. fo. 339. c. 459. 4 H. 6. 31. Brook tit. Teſtament, n. 9. M. 8 Jac. Graunts caſ. Rolls abridgment, tit. Deviſe.

[h] Latius inf. par. 6. § j.

[i] Plowden in caſ. inter Greisbrook & Fox.

[k] Brook Abridg. tit. Adminiſtrator, n. 45.

[l] Supra eod. part. § 8. num. 18.

lain [m].

lain [m]. Furthermore (17) it is not onely lawfull for the wife being Executrix to make a Teſtament without her husband's licence, but ſhe may name and appoint him executor [n]. Howbeit this poſition, (18) that the wife being Executrix, may make her Will of thoſe goods whereof ſhe is Executrix, without her husband's licence, is reſtrained in two caſes. The one is, when ſhe doth not make an Executor, but bequeatheth the goods whereof ſhe is Executrix by deviſe or Legacy [o]. The other is, when (19) ſhe is not onely Executrix, but Legatary alſo, and hath accepted of the thing bequeathed, not as Executrix, but as Legatary [p]. In theſe two caſes the Will is void. The (20) reaſon of the former of theſe two limitations is, becauſe an Executor may not diſpoſe of the goods of the Teſtator, otherwiſe then to the uſe of the Teſtator, as to the payment of his debts, performance of his Will, and to other charitable uſes [q]: and therefore may not give or deviſe the ſame by Legacy; for that were to diſpoſe of the Teſtator's goods as if they were the proper goods of the Executor, and to convert the ſame to the private uſe of the Legatary [r], and not to the uſe of the Teſtator. But when an Executor doth onely make another Executor, the ſecond Executor doth ſtand chargeable and accountable for the diſtribution of the firſt Teſtator's goods to the uſe of the ſame Teſtator, as did the former Executor, and is by the Laws of this Realm reputed for the Executor, not of the Executor, but of the former Teſtator †; ſo is not a Legatary. The (21) reaſon of the ſecond limitation is this; for that which one hath as Legatary, he hath it to his own private uſe [t], and not to the uſe of the Teſtator: and the wife being not onely Executrix, but Legatary alſo, accepting of the thing bequeathed, not as Executrix, but as Legatary, doth thereby make it her own proper goods, and conſequently her husband's: For that which is the wife's, is by reaſon of the Marriage her husband's, and being inveſted in him [v], (as hath been ſaid before) cannot be given from him without his licence or conſent [x]. Great difference there is therefore betwixt theſe two caſes, of accepting the thing bequeathed as Executrix, or as a Legatary: for in the one caſe it is not her husband's, and ſo ſhe may make a Teſtament thereof, by appointing an Executor to diſtribute the ſame to the uſe of the firſt Teſtator [y]; and in the other caſe it is her husband's, and ſo ſhe cannot make any Teſtament of the ſame without his licence [z]. Howbeit though the wife, being Executrix, may make her Teſtament, and appoint an Executor of thoſe goods which ſhe had as Executrix, and not as Legatary, without her husband's licence: yet nevertheleſs the profit and fruit which happen and ariſe out of thoſe goods which ſhe had as Executrix during the Marriage, as Calves, Lambs, and ſuch like profit of Kine, Sheep, and Cattel, do belong and accrue to her husband †, and not to herſelf as Executrix: and therefore ſhe cannot make her Teſtament of ſuch fruits and profits without her husband's licence, conſent or approbation, to whom they do belong *.

But (22) here ariſeth another queſtion: What if it do not appear whether the wife did accept the thing bequeathed as Executrix, or Le-

[m] Old tenures, tit. villenage.

[n] Brook Abridg. tit. execu. n. 11. Apologie for ſundry proceedings, par. 1. c. 3 pag. 22. in fin.

[o] Plowd. in caſu inter Bransby & Grantha, fol. 525. Imo nec cum conſenſu mariti poteſt legare teſtatoris bona.

[p] Infra hoc ipſo § n. 21.

[q] C. ſtatutum. lib. 3. provincial. conſtitut. Cant. Plowd. caſ. inter Bransby & Grantham. & infra 6. part. § j. & § iij.

[r] Plowd. ubi ſupra. facit c. filius de teſta. ext.

† Brook Abridg. tit. execut. n. 132. & infra par. 6. § j. § iij. tu vide Bar. in L. veluti. ff. de petic. hær.

[t] L. legatum. de leg. 2. L. à Titio. de furtis. ff.

[v] Tract. de rep. Ang. lib. 3. c. 6.

[x] L. id quod noſtrum. de reg. jur. ff.

[y] Brook tit. exec. n. 11.

[z] Supra eod. § Rolls abridgment, tit. deviſe.

† Ita ſæpe nunciarunt mihi juris hujus regni perit. quorum opinioni acquieſcendum duxi.

* Infra parte 3. § 6. n. 17.

Legatary? In whether name is ſhe preſumed in Law to have accepted the ſame? as Executrix, or as Legatary? Some are of this opinion, that ſhe is eſteemed to have accepted the ſame as Executrix, not as Legatary [f]; becauſe it is not lawfull for Legataries to carve for themſelves, taking their Legacies at their own pleaſure [g], but muſt have them delivered by the Executor [h]. And therefore if any ſhould determine to accept ſuch a Legacy, it behoveth him by proteſtations, or other act anſwerable, to manifeſt the ſame [i]. Others are of a contrary opinion, namely, that in this caſe ſhe is reputed to have accepted the thing bequeathed as Legatary, not as Executrix [k]: Becauſe where any act may be done, or any thing taken or poſſeſſed by a double right, the party is preſumed to doe that act, or to take and poſſeſs that thing, by force and virtue of that right which is more favourable and more beneficiall to the partie [l]. Now it is more profitable for every one which is both Executor and Legatary, to accept the thing bequeathed as Legatary, then as Executor; becauſe the Legatary hath full right in the thing bequeathed, and may diſpoſe thereof at his pleaſure [m]: Whereas an Executor hath not any ſuch right, but muſt diſpoſe the Teſtator's goods to the onely uſe and for the onely behoof of the Teſtator [n]. And therefore unleſs by ſolemn proteſtations [o], or other means, it may appear that the Executor did accept of the thing bequeathed as Executor, the party ſhall be deemed to have accepted the ſame as Legatary: which opinion (if I do not erre) is more agreeable to the rules of the Civill Law [p]. If a leaſe for years be deviſed to A. an Executor, and he enters generally, he ſhall take as Deviſee, and not as Executor; except it may turn to his prejudice, as to charge him in a *Devaſtavit*, if there be not ſufficient to pay debts. H. 36 Eliz. rot. 515. *Portman* verſ. *Willis*. 20 E. 3. fo. 9. P. 19 Eliz. rot. 318. C. B. *Higs* & *Burgh*. H. 21 Eliz. B. R. rot. 133. *Woodward* verſ. *Burgh*. Moors rep. fo. 352. n. 474. A term for years was granted upon condition, that the leſſee ſhould not alien without the aſſent of the leſſor, the leſſee makes his will and deviſes the term to his Executor, who enters generally: adjudged a forfeiture and breach of the condition, becauſe the general entry ſhall be intended as deviſee. 20 Eliz. enter Señor *Windſor* & Señor *Boroughs*. As for the reaſon of the other opinion, that a Legatary may not take his Legacie of his own authority; that is true, when another perſon is appointed Executor, otherwiſe not [q]. But yet although this opinion ſeem more agreeable to the rules of the Civill Law, that the party ſhall be deemed to have accepted the thing bequeathed as Legatary, rather then as Executor, whenas it doth not otherwiſe appear by what title or right the ſame was accepted: nevertheleſs the contrary opinion (as I take it) is more agreeable to the Laws of this Realm; namely, that when a thing is deviſed by the Teſtator to a man, and the ſame man made Executor, he ſhall be deemed to have accepted the ſame rather as Executor, then as Legatary;

[f] Plowd. in caſ. inter Paramor & Yardley, lib. 8. fol. 543. Dyer d. fol. 277.

[g] L. 1. Quorum lega. ff. L. non dubium. de leg. C.

[h] Perkins tit. teſtam. c. 7. fol. 9 i. b.

[i] L. deteſtatio. de verb. ſig. L. pro hærede. de acquir. hæred. ff. Dyer fol. 277. An. Eliz. 10.

[k] Plowd. in caſ. inter Paramor & Yardley, ubi variis arg. ſatagit hoc ipſum confirmare. Dyer fol. 367. Anno Eliz. 22.

[l] Alciat. de præſump. reg. 3. præſump. 36. n. 4, 5. poſt Alex. in L. Gallus. § ult. de lib. & poſt. ff. num. 10. & Jo. And. in c. ſi ſuo de offic. del. in 6. Maſcard. tract. de probac. concl. 42. n. 30. Plowd. ubi ſupra, fol. 543. b. in fin.

[m] L. legatum. de leg. 2. L. à Titio, de fur. ff.

[n] C. ſtatutum. de teſtam. § nullus. lib. 3. provincial. conſtitut. Cant. Magna charta, c. 18. Perkin. tit. deviſe, fol. 97.

[o] Nam declaranti parti credendum eſt, cum dubitatur an ex hac vel illa cauſa rem poſſidebat. ff. D. in d. L. Getic. ff. de acquir. hæred. Maſcard. tract. de probac. concl. 47. n. 9.

[p] L. in toto jure. de reg. jur. ff. Maſcard. tract. de probac. concl. 45. num. 29. 37. 57. Gravet. conſil. 197. n. 4.

[q] Sichard. in L. non dubium. C. de lega. n. 13 & Jaſ. in eadem L. lin. 2.

whenas

whenas it is otherwiſe doubtfull and cannot appear by what title or right the thing bequeathed was accepted *. As for example, The Teſtator poſſeſſed of a leaſe for term of years, doth deviſe or bequeath a leaſe to one for term of his life, the remainder over to another, and doth make the Legatary his Executor, who after the death of the Teſtator doth prove the Will, and enter, not declaring by what title or right, and afterwards makes his Executor and dieth; after whoſe death this laſt Executor doth prove the Will of the former Executor, and doth enter to the leaſe, and doth take the profits thereof. In this caſe the Executor of the Executor, and not the Legatary in remainder, ſhall enjoy the ſaid leaſe, by the opinion of the temporall Laws †: for that it is to be intended, that the former Executor did enter to the ſaid leaſe and accept thereof as Executor, and not as Legatary ‖. Which thing nevertheleſs goeth hard with all Teſtators, ſeeing thereby their Teſtaments may eaſily be defeated by their Executors, whoſe office is to perform the ſame according to the good meaning of the Teſtator, and the truſt repoſed in the Executors *.

* Plowd. ubi ſupra. Dyer fol. 277. Anno Eliz. 10.

† Dyer ubi ſupra.

‖ Ibidem.

* Infra part. 6. per totum.

A man maketh his Will in writing, and thereby giveth ſeveral Legacies, and deviſes the reſidue of his goods and chattels to his Wife, whom he maketh Executrix, to pay his debts, and to beſtow for the health of his Soul: adjudged the wife ſhall take as Executrix, and not as Legatee, by reaſon the words, *(viz.)* to pay his debts, and to beſtow for the health of his Soul, are no more then what the Law ſaith. *(a)*

(a) M. 15 & 16 Eliz. *Hunks* verſus. *Alborough*, Moors rep. fo. 98. n. 242.

If a man ſeiſed of Lands, and poſſeſſed of a term, deviſe all his Lands and Tenements to his Executors, untill they have paid his debts and Legacies, and levied all the charges which they ſhall expend in ſuits of Law againſt J. S. or others about the Execution of his will; he maketh two Executors, and dieth; the Executors enter generally into the land and the leaſe: adjudged that they take the leaſe as Executors, becauſe the words of the Will make no other declaration then what the Law ſaith without ſuch a declaration; and they ſhall take the lands in Fee as deviſees. *(b)*

(b) H. 36. Eliz. rot. 46. *Parnel* verſ. *Fen.* Moors rep. fo. 350. n. 470.

What (23) if the caſe be ſuch, as the wife cannot make her Teſtament without licence, and that the husband doth grant licence to the wife to make her Teſtament of a certain portion of his goods, (as many times it hath happened, and may again fall out, by reaſon of bonds and covenants at or before the Marriage,) and that the wife, ſo licenſed to make a Teſtament, doth firſt make one Teſtament, and afterwards another, and peradventure the third, or fourth? whether ſhall the licence be extended to the laſt Teſtament, or ſhall it be underſtood of the firſt Teſtament onely? For that Teſtament is to be approved by the Ordinary, for the making whereof the wife is licenſed. Divers, and thoſe of great authority, are of opinion, that the licence is to be underſtood of the firſt Teſtament, and not to be extended to any other Teſtament [r]. Others are of this judgment, that the licence is to be extended to the laſt Teſtament †: otherwiſe the former Teſtament ſhould be void, becauſe it is revoked by the latter [t]; and the latter Teſtament ſhould

[r] Socin. conſil. 89. vol. 1. Dec. conſil. 512.
† Sarmientus, tract. de reddit. Eccleſiaſt. c. 4.
[t] § poſteriore. Inſtit. quib. mod. teſt. infir.

be void for want of the husband's licence [v]; and ſo no Teſtament at all ſhould take place: or if the former Teſtament were not revoked by the latter, as being unlawfull, then it muſt be granted that a Teſtament may take place not onely without the Will, but even againſt the Will of the Teſtator [x]; whereas it ought to be directed and ruled according to the Will of the Teſtator, from whence it hath his life and being [y]. And although it be ſo, that when licence is granted to any to doe an itterable act, otherwiſe againſt Law, it ought to be reſtrained to the firſt act onely [z], whereof an hundred inſtances might be brought [a]: yet that rule is to be underſtood, when the firſt act doth or may take effect in the life-time of the perſon to whom ſuch licence is granted [b]. But in our caſe the act, that is to ſay, the Teſtament, is of no force before the death of the Teſtator [c]; and therefore that ought not to miniſter an impediment, which is without effect in Law [d].

[v] Lindw. in c. ſtatut. verb. propriorum ux. de teſta. lib. 3. provincial. conſtit. Cant.

[x] Quod certe valde abſurdum eſt. Quum potius tolerandum ſit ut quis decedat inteſtatus, quam ut teſtamentum contra voluntatem teſtatoris ſuſtineatur. Mantic. de conject. ult. vol. l. 2. tit. 15.

[y] Supra prim. par. §3.

[z] L. Boves. § hoc ſermone. de verb. ſig. ff.

[a] Tiraquel. in repet. d. § hoc ſermone.

[b] Sarmientus ubi ſupra. [c] C. Matthæ. de celebr. miſſ. extr. [d] C. non præſtat. de reg. jur. 6.

Debt upon an obligation, the condition was, Whereas the defendant had taken A. S. to wife, who was a widow, being poſſeſſed of divers goods, if he would permit his ſaid wife to make a Will, and to diſpoſe in Legacies ſo much as would not exceed 50 li. and perform what ſhe appointed, that then, &c. The defendant pleaded that ſhe made no Will, whereupon iſſue was joined. It was found, that ſhe made a Will, and thereby diſpoſed of divers Legacies not exceeding 50 li. but that ſhe was a feme Covert at the time of the making of the Will: it was adjudged for the plaintiff. For although ſhe, being a feme Covert, could not in Law be permitted to make a Will to diſpoſe of any goods without the husband's aſſent; yet it is a Will within the intent of the condition: for the intent of the condition was, that ſhe ſhould make a Will to that purpoſe, notwithſtanding the Coverture; and it is but her appointment, which the husband by the obligation is bound to perform; and the finding that ſhe was a feme Covert, was not in this caſe materiall. M. 5 Car. B. R. *Marriot* and *Kingman*'s Caſe. Croke part 1. fol. 159.

A defendant covenanted with the plaintiff by Indenture, that whereas he intended to marry E. S. a widow, that he would pay all the Legacies which ſhe by her laſt Will and Teſtament in writing bearing date the firſt of *May* 20 Eliz. did give and bequeath, and was bound by obligation to perform the covenants in the Indenture. In debt upon the obligation the defendant pleaded, that after the making of the Will and the obligation, he intermarried with the ſaid E. S. which marriage continued till her death, ſo the Will and deviſe of E. S. was void: and demanded Judgement. And it was adjudged that the plaintiff ſhould recover: for notwithſtanding it was not a Will to all intents and purpoſes, yet the Indenture referreth to that which beareth the name of a Will. P. 26 Eliz. C. B. *Eſton* verſ. *Wood.* Croke part 3. pl. 9.

§ X. Of

§ X. Of thoſe which be Deaf and Dumb.

1. *Some perſons are both deaf and dumb; others deaf, but not dumb; and others again dumb, but not deaf.*
2. *Whether he which is both deaf and dumb may make a Teſtament.*
3. *Whether he may make a Teſtament which is deaf, but not dumb.*
4. *Whether he may make a Teſtament which is dumb, but not deaf.*

WHere it is ſaid, that ſome perſons cannot make a Teſtament by reaſon of the defect of ſome of their principall ſenſes [a]; that we may the better underſtand who thoſe be, we are to note, (1) that ſome perſons can neither hear nor ſpeak; others can ſpeak, but not hear; ſome again can hear, and not ſpeak [b]. Touching the firſt ſort, (2) that is to ſay, thoſe which are both deaf and dumb, if any be ſo by nature, then can he not make any kind of Teſtament or laſt Will [c]; unleſs it do appear by ſufficient arguments, that he underſtandeth what a Teſtament meaneth, and that he hath a deſire to make a Teſtament: for if he have ſuch underſtanding and deſire, then he may by ſigns and tokens declare his Teſtament [d]. If he be not deaf and dumb by nature, but being once able to hear and ſpeak, if by ſome accident afterwards he loſeth both his hearing and the uſe of his tongue; then in caſe he be learned, and be able to write, he may with his own hand write his Teſtament or laſt Will, and ſo by art ſupply the defect of nature *. But if he be not able to write, then is he in the ſame caſe that they are which be both deaf and dumb by nature; that is to ſay, if he have underſtanding, he may make his Teſtament by ſigns, otherwiſe not at all [f].

[a] Supra eod. part. § item.

[b] Minſing. in § Item ſurdus. Inſtit. quibus non eſt permiſſum teſta. fac.

[c] L. diſcretis. C. qui teſta. fac. poſſ. § Item ſurdus. Inſtit. quibus non eſt permiſſ. teſta. fac.

[d] Dec. in d. L. diſcretis. Tiraquel. de privileg. piæ cauſæ, c. 9. Hoc ſcilicet ſubintellecto, ut in confectione teſtamentorum Anglicorum ſufficiat probatio juris gentium. Id quod non ſemel dixi, ſed & ſæpius eſt dicendum.

* d. § Item ſurdus. Inſtit. quibus non eſt permiſſ. teſta. fac. [f] Dec. in d. L. diſcretis. Tiraquel. de privileg. d. c. 15. piæ cauſæ.

Such (3) as can ſpeak, and cannot hear, may make their Teſtaments, as if they could both ſpeak and hear: neither skilleth it whether that defect came by nature, or otherwiſe [g]. But there is none found ſo deaf, but that he is able to hear ſomewhat, if not the crying voice of a man, yet the loud voice of ſome inſtrument, as of a Horn, or a Trumpet, or a Gun [h]. And if he can ſpeak, it is certain that he could once hear, otherwiſe if he could never have heard, he could never have ſpoken: for how could he be inſtructed to ſpeak, if he could never hear [i]?

[g] Minſing. in d. § item ſurdus.

[h] Paul. de caſtr. & Jaſ. in d. L. diſcretis.

[i] DD. in d. L. diſcretis. & in d. § Item ſurdus.

Such (4) as be ſpeechleſs onely, and not void of hearing, if they be learned, may very well make their Teſtaments themſelves by writing; or being unlearned, may alſo make their Teſtaments by ſigns, ſo that the ſame ſigns be ſufficiently well known to ſuch as then be preſent [k].

[k] DD. in L. diſcretis.

§ XI. Of

§ XI. Of a Blind man.

1. *A blind man may make a nuncupative Teſtament.*
2. *Whether a blind man may make a written Teſtament.*

HE that (1) is blind may make a nuncupative Teſtament, by declaring his Will before a ſufficient number of witneſſes [a]. But (2) he cannot make his Teſtament in writing, unleſs the ſame be read before witneſſes, and in their preſence acknowledged by the Teſtator for his laſt Will. And therefore if a writing were delivered to the Teſtator, and he, not hearing the ſame read, acknowledged the ſame for his Will, this were not ſufficient; for it may be that if he ſhould hear the ſame, he would not own it [b].

[a] Sed an requirantur omnes ſolennitates, de quibus in L. hac conſultiſſima. C. qui teſta. fac. poſſ. Et videtur eas adhiberi debere, quia, communi Doctorum opinione, ſolennitatis hujus L. adhibenda eſt vel in teſtamento ad pias cauſas à cæco condito; nec alias quicquam valet. Graſſ. Theſaur. com. op. § teſtm. q. 31. Ego vero adhæreo Alex. Jaſ. Decio, Sichardo, & aliis in cad. L. hac conſultiſſima, & Tiraquel. qui putarunt hanc ſolennitatem non eſſe neceſſariam in hujuſmodi teſtamento, ſed ſufficere probationem juris gentium: & hanc opinionem recepit generalis regni noſtri conſuetudo. [b] DD. in d. L. hac conſultiſſima. C. qui teſta. fac. poſſ.

§ XII. Of Traitours.

1. *Traitours loſe both their lives, lands and goods, and conſequently are inteſtable.*
2. *Traitours are inteſtable not onely from the time of their conviction, but from the time of the crime committed.*
3. *A Traitour pardoned and reſtored may make his Teſtament.*

OF thoſe who are prohibited to make their Teſtaments as Malefactours, (who now are to make their appearance, and to ſhew themſelves in the courſe of this Treatiſe,) Traitours, becauſe they are moſt pernicious to the commonwealth, are moſt worthy the firſt place in puniſhments.

Underſtand (1) therefore, that whoſoever is lawfully convicted of high treaſon, by verdict, confeſſion, outlawry or preſentment, beſides the loſs of his life, ſhall forfeit to the Prince all his goods and chattels, and all ſuch Lands, Tenements and Hereditaments, as he ſhall have in his own right, uſe, or poſſeſſion, of any eſtate or inheritance, at the time of ſuch treaſon committed, or at any time after [a]; and ſo conſequently is inteſtable [b]. Inſomuch (2) that Traitours are not onely deprived of making any Teſtament, or other kind of laſt Will, from the time of their conviction; but alſo the Teſtament before made doth by reaſon of the ſame conviction become void, both in reſpect of goods, and alſo in reſpect of Lands, Tenements and Hereditaments [c].

Nevertheleſs if (3) any perſon being attainted of treaſon obtain the Prince's pardon, and be thereby reſtored to his former eſtate; then may

[a] Stat. Ed. 6. an. 5. c. 11. [b] L. quiſquis. § j. C. ad L. Jul. majeſt. L. ſi quis. de injuſt. teſt. L. nemo. ff. de leg. 1. Vaſq. de ſucceſſ. progreſſ. lib. 1. § j. n. 165. qui multis ampl. hanc concl. ornat. [c] Stat. Ed. 6. an. 5. c. 11. DD. in d. L. nemo. de leg. 1. ff. & Vaſq. ubi ſupra.

may he make his Teſtament, as if he had not been convicted [d]: or if he made any before his conviction and condemnation, the ſame by reaſon of ſuch pardon recovereth his former force and effect, as hereafter is more fully declared *.

[d] L. ſi quis. § quatenus. ff. de injuſt. rupt. & irrit. teſta.

* Infra 7. part. § xvij.

But if a Traitour hath goods as Executor to another, the ſame are not forfeited; whence it follows, that of ſuch goods he may make his Will.

§ XIII. Of Felons.

1. *Felons loſe life and goods, and ſo be inteſtable.*
2. *Who ſhall have felons lands.*
3. *Whether he that is onely indited of felony may make his Teſtament.*
4. *Whether he that ſtandeth mute may make his Teſtament of his Lands.*
5. *Whether a man after he is apprehended for felony may make his Teſtament.*
6. *Felons goods not to be ſeiſed before attainder.*
7. *The Teſtament of a Felon convicted is void, though he be never executed.*

IF any perſon (1) be condemned of Felony, he ought to ſuffer death, and the Prince ſhall have all his goods, whereſoever they be found [a]. And if he (2) have any free-hold, it ſhall forthwith be ſeiſed into the Prince's hands, and the Prince ſhall have the profit thereof by the ſpace of a year and a day, and alſo waſte [b]: and after the Prince hath had it the year and the day and waſte, the Land ſhall be reſtored to the chief Lord of the fee; except in certain places, as in the County of *Glouceſter*, where after a year and a day the Lands and Tenements of felons ſhall revert to the next heir to whom it ought to have deſcended, if the felony had not been committed [c]: or in *Kent* in *Gavel-kind*, whereas it doth deſcend to all the heir-males, equally to be divided, or to the daughters, where there be no ſons, to be divided amongſt them. For there it is ſaid, *The Father to the bough, and the Son to the plough* [d]. Felons therefore lawfully convicted cannot make any Teſtaments, or other diſpoſitions of any goods or Lands, whereof (as we ſee) the law hath diſpoſed already *.

[a] Stat. Eliz. an. 5. c. 14. *Terms of Law*, verb. *Robbery*.

[b] Prærog. Reg. c. 16. Eliz. an. 5. c. 14.

[c] Prærog. reg. c. 16.

[d] Eod. c. 16.

* Duplici ratione damnatus ad mortem fit inteſtabilis, nimirum, bonorum publicatione, & damnatione ad mortem. Damnatus autem ad mortem naturalem efficitur ſervus pœnæ, quod communi opinione nititur, adverſus eos qui exiſtimarunt ingenuum hodie non effici ſervum pœnæ hujuſmodi damnatione: ſed procedit prior opinio, ſive quis damnatus ſit ſecundum jus commune, ſive etiam ſecundum ſtatutum alicujus loci. Jul. Clar. § teſtm. q. 21. Covar. in Rub. de teſta. extr. part. n. 27. Michael Graſſ. Theſaur. com. op. § teſtm. q. 26.

But (3) if any man be indited onely of Felony, and die before he be convicted or attainted, he may make his Teſtament of his goods, and alſo of his Lands [f]. Or if (4) he be indited at the Prince's ſuit, and ſo being arrained upon that inditement, will not anſwer, but ſtandeth

[f] Quia non condemnatus non reperitur prohibitus. Vide ſtat. R. 3. an. 1. c. 3.

mute or dumb, whereupon he is to receive pain (as it is termed) *Forte* and *Dure*, and be preſſed to death [g]: in this caſe his Goods onely be confiſcate, but not his Lands [h]; and therefore in this caſe I ſuppoſe he may make his Teſtament of his Lands [i].

[g] Doct. & Stu. l. 2. c. 41.
[h] Ibidem. Stanf. pl. Coron. fol. 139. 185. Inſt. part. 1. fol. 391.
[i] Quia viz. non prohibetur, quod non condemnatur.

If a Felon (5) be indited, and afterwards attainted by verdict or confeſſion, the time of the fact committed compriſed in the inditement is to be regarded in reſpect of his lands: but in reſpect of his goods, the time of his judgement [k]. And therefore if before judgement he do ſell, give, or otherwiſe alienate his goods, ſuch ſale, gift or alienation is good [l]. Neither (6) may the Sheriff or other perſon take or ſeiſe the goods of any perſon arreſted and impriſoned, before the ſame perſon be convicted or attainted of felony, according to the Law, or that the goods be otherwiſe lawfully forfeited [m]. Howbeit, if he make his Teſtament before the condemnation, foraſmuch as the Teſtament is not good before his death [n], ſuch diſpoſition being prevented by judgment or condemnation is made fruſtrate [o]; inſomuch that if the (7) Teſtator being convicted of Felony be never executed, for that perhaps he dieth in priſon, or eſcapeth out of priſon and dieth naturally; yet is the Teſtament void by force of the condemnation, unleſs he do obtain his pardon, and therewithall full reſtitution to his former eſtate [p].

[k] Perk. tit. grants, f. 6. Inſt. part. 1. fol. 391. Stat. de catallis felonum. ver. Mag Chart. fol. 66. part. 2. 40 E. 3. 11. 3 E. 3. Coron. 65. Dame *Hales* Caſ. Pl. com. fol. 262.
[l] Perkins ubi ſup. concordat jus Civile. L. poſt contractum. ff. de donac. cum diſtinctione tamen, ut per Bar. in d. L. Graſſ. § teſtm. q. 26.
[m] Stat. R. 3. an. 1. c. 3. 8 E. 4. fol. 4. Brook tit. forfeiture, pl. 58. 89. Stanf. pl. Coron. fol. 152. lib. 5. fol. 110. *Foxlies* Caſe. 7 H. 4. 11. 1 R. 3. c. 3. [n] c. Matthæ. de celeb. miſſ. extr. [o] Panor. in Rub. de teſta. extr. Jul. Clar. § teſtm. q. 21. Graſſ. § teſtm. q. 26. Vaſq. de ſucceſſ. reſol. lib. 1. § 6. n. 18. [p] Panor. in Rub. de teſta. extr. Jul. Clar. § teſtm. q. 21. Graſſ. § teſtm. q. 26. Vaſq. de ſucceſſ. reſolut. lib. 1. § 6. n. 18. [p] L. ſi quis. § quatenus. ff. de injuſt. teſta.

§ XIV. Of Hereticks.

1. *An Heretick cannot make a Teſtament.*
2. *Whether and when doth an Heretick forfeit his Lands or Goods.*
3. *Whether is the Teſtament good, if the Heretick were never convicted.*
4. *An Heretick may be condemned after his death.*
5. *Whether an Heretick, having reclaimed his Hereſy, may make a Teſtament.*

AN (1) Heretick cannot make a Teſtament [a]. And albeit, by the Laws and cuſtoms of this Realm, an (2) Heretick do not forfeit his Lands, unleſs, being delivered to Lay-mens hands, he be executed for his Hereſy [b], nor his goods, unleſs, being convicted of Hereſy, he be delivered to Lay-mens hands [c]: yet if he be convicted, and publickly excommunicated, though not as yet delivered, he cannot make a Teſtament of his goods or chattels [d].

[a] Auth. credentes. C. de hæret. Lindw. in c. 1. de hæret. Vaſq. de ſucceſſ. reſoluc. lib. 1. § iiij. n. 23. Simo de Prætis de inter. ult. vol. l. 2. dub. 1. ſoluc. 4.
[b] Doct. & Stud. lib. 2. c. 29. 5. fol. 157. Brook tit. forfeiture, n. 110. [c] Ibidem. [d] Bar. in d. Auth. credentes. Graſſ. § teſtm. q. 24. Clar. § teſtm. q. 24. Gabr. com. conſ. lib. 4. tit. de teſta. c. 1. Quære tamen p. ſtat. 2 Hen. 5. c. 7.

If

If he (3) were never convicted of Hereſy, and yet die an undoubted Heretick; in this caſe it may ſeem that his Teſtament is void in reſpect of his goods; the rather by force of the Excommunication, into the which by reaſon of his hereſy he did fall *ipſo facto* *; eſpecially if in his life-time he were ſo publickly denounced [f]: yea though he were not ſo denounced, yet (4) ſo odious is the crime of Hereſy, that he may be condemned of Hereſy after he be dead [g]; at leaſt the exception of inteſtability may be oppoſed againſt the probate of the Teſtament [h]. If the (5) Teſtator reclaim his Hereſy, then he is not inteſtable, although he did not reclaim the ſame before condemnation, ſo that he do it before he be delivered to the ſecular power [i]. But howſoever he recover ability to make a Teſtament, which reclaimeth his Hereſy; yet the Teſtament made by an Heretick, whiles he perſiſteth in his Hereſy, doth not recover any force by ſuch recantation [k]. And if he fall again into the Hereſy, by ſuch relapſe he doth incur all the puniſhments whereunto he was ſubject before; neither is his recantation any more to be accepted [l].

* Abolend. de ſen. excom. ext. Lindw. in d.c. 1. de hæret. & infra ead. parr. § 18.

[f] At non ſufficit excommunicatio, etiam ob crimen quo efficitur quis inteſtabilis, niſi ſit publicata, ſi verum dicat Simo de Prætis de interp. ult. vol. l. 2. fol. 148. n. 75.

[g] c. ſane profertur. q. 2. L. ex judiciorum. ff. de accu. L. Manichæos. C. de hæret. c. urgentis. de hær. extr. Jul. Clar. § hæreſis, n. 21. Ægid. Boſſ. tract. var. tit. de hæret. Bellam. Dec. 677. cum ſeq.

[h] Per ea quæ habet Dec. in L. 1. de ſecundis nuptiis. C. num. 7. Cardinal. in clem. eos de ſepultur. q. 19. & infra ead. part. § 18.

[i] Hoc tamen jure quo nos utimur, nam jure civili reclamans poſt hæreſin poſt ſententiam ſolum evitat pœnam mortis. Panor. in c. pen. de hæret. extr. Boer. deciſ. 343. Boſſ. tract. var. tit. de hæreticis.

[k] Simo de Prætis de interp. ult. vol. lib. 2. dub. 1. ſoluc. 4. n. 56. cujus rei ratio eſt, quia teſtm. fuit ab initio nullum.

[l] Clar. Boſſ. Carerius, Grillandus, & alii de Hæreticis.

Nota, the Statute made 2 H. 5. c. 7. whereby the forfeiture of Lands in Fee-ſimple and goods and chattels were given in caſe of Hereſy, ſtandeth repealed by the Statute 1 Eliz. c. 1. The books which ſpeak of forfeiture are grounded upon the ſaid Statute 2 H. 5. which then ſtood in force; ſaving 5 R. 2. which was before that Statute. For neither lands nor goods before the making of that Statute of 2 H. 5. were forfeited by the conviction of hereſy, becauſe the proceeding therein is meerly ſpirituall, and *pro ſalute animæ*, and in a Court that is no Court of record: and therefore the conviction of hereſy worketh no forfeiture of any thing that is temporall, *viz.* of lands or goods.

Libro 5. fol. 25. l. *Cawdrys* Caſe. Inſt. part. 3. fol. 43.

§ XV. Of an Apoſtata.

1. *An Apoſtata cannot make a Teſtament.*
2. *An Apoſtata worſe then an Heretick.*
3. *Who is an Apoſtata.*
4. *The ſtate of the Heretick, and of the Apoſtata damnable.*
5. *Three kinds of Apoſtaſy.*
6. *Every Apoſtata is not inteſtable.*

THat (1) which hath been ſpoken of an Heretick may alſo be verified of an Apoſtata [a]. For he is (2) as bad, or rather worſe and more execrable [b]. For (3) an Apoſtata is he which doth wholly ſtart back

[a] L. 1. 2. & 3. C. de Apoſtat. Summa Hoſtienſ. tit. de Apoſtat. § qualiter.

[b] Weſenb. in tit. de apoſt. C. L. ult. C. eod.

back from the Chriſtian faith, which once he did profeſs, and wherein he was once baptized; and becometh in profeſſion a *Jew* or a *Turk*, or ſome other Infidell, approving their deteſtable rites and ſuperſtitions [c]: whereas an Heretick, albeit he do obſtinately perſevere in his errour, yet he erreth not wholly, but particularly in ſome part of Chriſtian Religion [d]. Both in truth are abominable, and the (4) ſtate of either miſerable and damnable. But of the two the Apoſtata is more horrible; and better were it never to have known the way of truth, then, after the knowledge thereof, to reject it, or ſtart away from it [*]. Worthily therefore is the Apoſtata to be as ſeverely puniſhed as an Heretick [f].

There (5) be three kinds of Apoſtaſy; *Perfidiæ*, *Inobedientiæ*, *Irregularitatis*; one of misbelief, another of diſobedience, the third of irregularity [g]. Apoſtaſy of misbelief is, when a man doth utterly forſake the Chriſtian belief, as mention is made before: ſo did *Julian* the Apoſtata. Apoſtaſy of diſobedience is, when the ſubject refuſeth to obey the lawfull commandment of his Ordinary or Superiour [h]: and ſo do many Anabaptiſts at this day. Apoſtaſy of irregularity is, when he that hath entred into the Miniſtery, and taken holy orders, forſaketh his ſpirituall profeſſion, and becometh not in habit onely, but in actions, a Lay-man [i]. But (6) I ſuppoſe that an Apoſtata from obedience, or from ſpirituall profeſſion, is not diſabled to make his Teſtament [k], though he be worthily ſubject to other grievous puniſhments [l].

[c] Summa Hoſtienſ. tit. de apoſtat. extr. c. non poteſt. 2. q. 7. c. quidam de apoſt. & c. contra Chriſtianos. de hæret. 6.
[d] Summa Hoſtienſ. tit. de hæret. & de Apoſta.
[*] 2 Epiſt. Petr. c. 2. ver. 21. Epiſt. Paul. ad Hebræos c. 6. ver. 6.
[f] Panor. in c. 1. de apoſtat. extr.
[g] Summa Hoſtienſ. tit. de apoſtat. § quot ſpecies.
[h] Summa Hoſtienſ. tit. de apoſta. Epiſt. ad Heb. c. 13. verſ. 17.
[i] c. à nobis. de apoſt. extr.
[k] Bar. in Rub. de apoſta. C.
[l] De quibus Ab. in c. 1. de apoſta. extr. & Hoſtienſ. ſumm. eod. tit. § qualiter puniantur.

§ XVI. Of Uſurers.

1. *A manifeſt Uſurer cannot make a Teſtament.*
2. *Every Uſurer is not inteſtable.*
3. *Who is a manifeſt Uſurer.*
4. *Whether one act may make an Uſurer to be manifeſt.*
5. *Whether he be an Uſurer which lendeth for gain, but doth not receive any more then the principall.*
6. *An Uſurer is not inteſtable in* England, *unleſs he take above ten in the hundred for a year's forbearance, or after that rate.*
7. *The puniſhment for Uſury in* England.
8. *A manifeſt Uſurer is not to be buried in any Church or Church-yard.*

A Manifeſt (1) Uſurer cannot make a Teſtament: and though he make one, it is void in Law concerning goods and chattels, unleſs he ſatisfy for the Uſury, or put in caution for ſatisfaction to be made [a].

Where it is (2) ſaid, a manifeſt Uſurer, we are to note, that not every Uſurer is excluded from making a Teſtament, but a manifeſt Uſurer onely [b]; that is to ſay, (3) ſuch an one as hath been condemned for an Uſurer, or hath publickly confeſſed that he hath taken uſury, or is publickly reputed and taken for an Uſurer amongſt his neighbours, who

[a] c. quanquam. de uſur. l. 6. Clar. § teſtm. q. 26. Michael Graſſ. Theſaur. com. op. § teſtm. q. 33.
[b] d. c. quanquam, & ibi gloſſ. & DD.

who are preſumed to know his life and converſation [c]. The verity of the fact, and exerciſe of the trade of Uſury, being the foundation of the fame and common opinion that he was an Uſurer †. In which caſe he being not onely an Uſurer, but a manifeſt Uſurer, exerciſing that trade, not privately onely, but publickly, his Teſtament is void in Law ‖: unleſs he made reſtitution or ſatisfaction for the ſame in his life-time *, or elſe caution be entred for reſtitution or ſatisfaction to be made after his death †.

[c] Gem. & Franc. in d. c. quanquam.

† Ubi conſtat de veritate exerciſii uſurarum, & talis veritas fortificatur per famam populi ſe illi conſonantem vel confirmantem, per tales probationes ſimul junctas inducitur probatio manifeſt. quoad finem, de quo in c. quanquam. de uſur. 6. Jo. de An. in c. 3. n. 3. de uſur. ext. quem vide n. 4. Panor. conſil. 2. l. 2. ‖ Menoch. de Arbit. Jud. l. 2. caſ. 235. Maſcard. de probac. concluſ. 1418. Alphonſ. Villag. Tract. de uſur. q. 35. n. 2. & 3. * Ed. ca. quanquam. de uſur. lib. 6. † Beroius in cap. Quam omnibus. de uſur. ext. n. 52.

And (4) albeit ſome are of this opinion, that a man cannot be ſaid to be a manifeſt Uſurer, unleſs he have divers times taken uſury [d]; yet that opinion is not held for ſound amongſt the writers of the Eccleſiaſticall Laws; who think that a man may be a manifeſt Uſurer by occaſion of one onely act, the ſame being publick and manifeſt *. Again, our Uſurers here in *England* deal ſo cunningly, and ſo colourably under the cloak of other contracts, ſhunning and avoiding the odious name of an Uſurer, and profeſſion of Uſury, that albeit they practiſe nothing more then Uſury in very truth, yet (by reaſon the colour wherewith their actions are dyed does blear the eyes of the World, and eſcape the puniſhment of Law) nothing almoſt can be more hardly proved, then that they be manifeſt Uſurers; ſo that a man may truly ſay, *Non deficit jus, ſed probatio:* wherein nevertheleſs what proof is ſufficient in this caſe, over and above the proofs formerly deſcribed, is left unto the wiſedom of the diſcreet and circumſpect Judge †. Nevertheleſs (5) it is not ſufficient in Law, to deprive a man of the authority or liberty of making a Teſtament, becauſe he hath lent his money or goods to uſury, unleſſe he have taken encreaſe over and above the principall [f]. Neither (6) is it ſufficient to have taken uſury, and that manifeſtly, to the effect of making the Uſurer inteſtable, unleſs he have received above the ſum of ten pound for the loan or forbearing of an hundred pound for one year, or after that rate [g]. For (7) although all uſury be worthily condemned by the Laws and ſtatutes of this Realm, as unlawfull and ungodly [h]: yet nevertheleſſe every kind of uſury is not puniſhable with like penalty. For if any do receive uſury onely after the rate of ten pound in the hundred for a year's forbearance, or under that rate, he ſhall onely forfeit ſo much as ſhall be reſerved or received by way of uſury above the principall [i]: but if any ſhall receive above that rate, he doth not onely loſe his principall, together with the intereſt, but is alſo to be puniſhed and corrected according to the Laws Eccleſiaſticall [k]. By (8) the which Laws Eccleſiaſticall, if any be a manifeſt Uſurer, not onely his Teſtament is void, as is aforeſaid, but his body, after he is dead, is not to be buried amongſt the bodies of other Chriſtian men, in any Church or Church-yard, untill there be reſtitution or caution tendered according to the value of ſuch goods [l].

[d] Bar. in L. 3. de furt. ff.

* Card. in clem. cos. de ſepul. q. 19.

† Menoch. d. Caſ. 135. in prin. & fin.

[f] Dom. & Franc. in d. c. quanquam. de uſur. l. 6. Ripa reſponſ. 116.

[g] Stat. Eliz. an. 13. c. 8.

[h] d. Stat.

[i] Ibid.

[k] Eod. Stat. Eliz. an. 13. c. 8.

[l] d. c. quanquam. de uſur. 6.

Si quis de uſurâ convictus fuerit, omnes res ſuas amittat *.
Uſurarii omnes res, ſive teſtatus ſive inteſtatus deceſſerit, regis ſunt **.
Manifeſtus uſurarius eſt inteſtabilis †.

By the old Laws of King *Alfred*, &c. it was ordained, that the chattels of Uſurers ſhould be forfeited to the King, their lands and inheritances ſhould eſcheat to the Lords of the Fees, and they ſhould not be buried in the Sanctuary ‖.

* See the Cuſtome de Norm. c. 20. Inter leges S. Edw.
** Glanvil. lib. 7. c. 16.
† Fleta lib. 2. c. 50.
‖ Major c. 1. § 3. c. 5. § 1. Parl. 50 E. 3. n. 58. Fleta lib. 2. c. 1. Bract. l. 3. f. 116, 117.

§ XVII. Of Inceſtuous perſons.

1. *Whether Inceſtuous perſons may give any thing by their Teſtament, and to whom.*
2. *What marriages be inceſtuous.*
3. *What degree of conſanguinity doth hinder marriage.*
4. *Certain caſes wherein the Teſtators may bequeath ſomething to their inceſtuous children.*

HE (1) which doth contract inceſtuous Marriage is prohibited to diſpoſe any goods or chattels by his Teſtament or laſt Will, either to his children begotten in ſuch inceſtuous Marriage, or to any other perſon [a]; ſaving to his children begotten in lawfull Marriage, (if he have any by a former wife,) or to his Parents, or to his Brother, or Siſter, or to his Uncle, or Aunt [b]. By (2) inceſtuous marriage, in this place, I underſtand ſuch marriages as are ſolemnized or had betwixt a man and a woman, being of kindred or alliance the one to the other within thoſe degrees of conſanguinity or affinity within the which it is not lawfull to marry [c]; that is to ſay, within the *Leviticall* degrees, or the degrees prohibited by God's Law. For (3) at this preſent, by the ſtatutes of this Realm it is declared and eſtabliſhed to be lawfull for all perſons to marry, which be not prohibited by God's Law; and that no prohibition (God's Law excepted) ſhall trouble or impeach any marriage, without the *Leviticall* degrees [d]. And therefore whoſoever doth marry being prohibited by God's Law, or being within the *Leviticall* degrees, cannot diſpoſe any thing by his Teſtament but to the perſons above named; and eſpecially not to his or her children begotten in ſuch inceſtuous marriages: unleſs (4) the parents were ignorant of the impediment of ſuch conſanguinity or affinity *. In which caſe, the marriage being publickly ſolemnized, the Children which are born during ſuch their ignorance, or the ignorance of one of them, are by the Eccleſiaſticall Canons capable of all Legacies and all manner of Teſtamentary benefits, as legitimate [f]; albeit the Parents afterwards ſhould be divorced [g]. Or unleſs ſo much onely were left unto their ſaid children, as

[a] L. ſi quis. C. de inceſt. nup.
[b] d. L. ſiquis. Per liberos autem intellige non ſolum filium & filiam, ſed nepotem & neptem, & deinceps alios utriuſque ſexus deſcendentes: & per parentes, non ſolum patrem & matrem, ſed etiamavum, aviam, & alios aſcendentes. Accurſ. Bald. & alii in d. L. ſi quis. Simo de Prætis de in. ult. vol. l. 2. dub. 1. ſoluc. 4. n. 92.
[c] Covar. de ſponſ. & matrim. 2. part. c. 6. § 8. c. lex illa. § inceſtus, 36. q. 1.
[d] Stat. H. 8. an. 32. c. 38.
* Simo de Prætis de interp. ult. vol. lib. 2. dub. 1. ſoluc. 4. n. 92.
[f] c. cum inhibitio. § ſi quis. de cland. deſponſ. extr. & ibi Panor. Brook tit. Baſtardy, n. 23. Fitzherb. tit. Baſtardy, n. 2.
[g] Cov. epit. de ſponſal. 2. part. c. 8. § 3. contrarium tenet Brook tit. baſtardy, n. 23. & alibi per eundem inter ſuos caſus, an. 24 Hen. 8. quem locum diligenter obſerves cupio.

would

would ſerve for their competent ſuſtentation or nouriſhment [h]: or unleſs the children were appointed bare executors, without any other benefit. In which caſes the Teſtament is good [i], as hereafter more at large [k].

[h] Iſtud ita jure Can. c. cum haberet. de eo qui dux. in ux. exquod c. locum habet non ſolum in ſpuriis, ſed etiam in inceſtuoſis, ut eſt com. op. teſte Decio in c. in præſentia. de prob. ext. n. 39. Gabr. lib. 6. de alimen. concl. 1. n. 5. [i] Infra 5. part. § 7. Petr. Duen. reg. 366. Limit. 9. verb. filius. Simo de Prætis de interp. ult. vol. lib. 5. fol. 17. n. 27. [k] Infra 5. part. § 7.

§ XVIII. Of a Sodomite.

1. *Who is a Sodomite.*
2. *A Sodomite cannot make a Teſtament.*
3. *What if he were never condemned of Sodomitry?*

A (1) Sodomite, (that is to ſay, he or ſhe that doth commit that wicked and horrible ſin againſt nature [a], as did the *Sodomites*, whereof mention is made in the holy Scripture [b],) is (2) prohibited to make a Teſtament [c], and to bequeath his goods and chattels. And albeit he were not convicted, (3) or condemned thereof in his life-time, yet I ſuppoſe this exception may be objected againſt the probate of the Teſtament [d]; for that he was inteſtable at the time of the fact committed *.

[a] Sodomia autem dicitur, non ſolum illud nefandum peccatum inter maſculos, ſed etiam flagitium illud contra naturam cum fœmina. & hæc opinio communis eſt, contra Socin. contendentem iſtiuſmodi peccatum non Sodomiam, ſed extraordinariam quandam pollutionem dici debere, quem DD. communiter reprobant, ut refert Vivius, lib. com. op. verb. Sodomia. Dec. in L. j. de ſecundis nuptiis, n. 9. C. Card. in clem. 1. de conſang. & aff. q. 13. [b] Gen. c. 19. [c] Spec. de Inſt. edit. § compendioſo, n. 5. [d] Dec. in L. 1. de ſecundis nup. D. Simo de Prætis de interp. ult. vol. li. 1. dub. 1. ſoluc. 4. n. 97. * Simo de Prætis & Dec. ubi ſupra. Adde Cardinal. in clem. eos. de ſepul. q. 19.

§ XIX. Of a Libeller.

1. *What is a famous Libell.*
2. *A Libeller inteſtable.*

A (1) Famous [a] Libell is a writing made to the infamy of any man, publiſhed abroad to that end [b]: and he that (2) is condemned for deviſing, writing, or publiſhing the ſame, is thereby deprived of the ability of making a Teſtament, or diſpoſing of any his goods or chattels [c].

[a] Famoſum quandoque in malam partem ſumi multis exemplis oſtendit Petrus à Placa, epit. delict. c. 3. [b] Summa Angel. Sum. Silveſt. verb. libellus. [c] L. ſi cui. § ſi quis. ff. de teſta. L. unic. de famoſ. libel. C. Petr. à Pla. epit. delict. lib. 1. c. 3.

§ XX. Of

§ XX. Of him that killeth himſelf.

IF any man do wittingly and willingly kill himſelf, his Teſtament, if he made any, is void [a]; both concerning the appointment of the Executor, and alſo concerning the Legacy or bequeſt of any goods; for they are confiſcate [b].

But by the law of this Realm, the goods and chattels of a *felo de ſe* are not forfeited, till it be found by the oath of 12 men before the Coroner *ſuper viſum corporis*, or appear upon record. So adjudged H. 27 Eliz. B. R. *Laughton*'s Caſe, cited in *Foxlie*'s Caſe, lib. 5. 110. b. Inſt. part. 3. fol. 55.

If the Teſtament be of lands, it ſeems it is not void, becauſe a *felo de ſe* doth not forfeit any lands of inheritance [c]: for no man can forfeit his lands without an attainder by courſe of Law.

[a] L. ſi quis filio. § cjus. de teſta. ff. L. 2. qui teſta. fac. poſſ. C.
[b] Vaſq. de ſucceſſ. reſoluc. lib. 1. § 3. n. 31.
[c] Britton c. 7. Cuſt. de Norman. c. 21. Inſt. part. 3. fol. 55.

§ XXI. Of him that is Outlawed.

1. *An Outlawed perſon loſeth his goods, and benefit of the Law.*
2. *What if the action be perſonall?*
3. *What if the action be unjuſt?*
4. *Whether an outlawed perſon may make his Teſtament?*
5. *What if the Prince give the goods to the Executor? whether is he therefore chargeable with the payment of Legacies?*
6. *He that is outlawed doth ſometime forfeit not goods onely, but lands alſo.*
7. *An outlawed perſon may make his Teſtament of lands not forfeited.*
8. *An outlawed perſon may aſſign Tutors Teſtamentary to his children.*
9. *Certain other caſes wherein he that is outlawed may make his Teſtament.*

AN (1) outlawed perſon is not onely out of the protection of the Prince, and out of the aid of the Laws of this Realm [a], but alſo all his goods and chattels be forfeited to the Prince, by means of the outlawry [b]; although (2) he were outlawed but in an action perſonall [c]: and although (3) alſo the action peradventure were not juſt, nevertheleſſe his goods and chattels are forfeited, by reaſon of his contempt in not appearing: for it is a *Maxime* in the common Laws of this Realm, that he that is outlawed doth forfeit all his goods and chattels to the Prince, without diſtinction whether the action be juſt or unjuſt [d]. And therefore (4) it followeth, that he that is outlawed cannot make his Teſtament of his goods ſo forfeited *. Inſomuch that (5) if the Prince, having ſeiſed the forfeited goods of the Teſtator, ſhould give the ſame again to the Executor; nevertheleſſe the Teſtament is void in reſpect of ſuch

[a] Fitzh. Nat. Br. fol. 161. *Terms of Law*, verb. *Utlegary*.
[b] Doct. & Stud. lib. 2. c. 3.
[c] *Terms* ubi ſupra.
[d] Doct. & Stu. l. 2. c. 3.
* Jul. Clar. § teſtm. q. 19. Doct. & Stud. lib. 1. c. 16.

ſuch goods; neither can the Legataries recover the ſame at the hands of the Executor [f]: for by the forfeiture and ſeiſin the property thereof is altered, and ſo ceaſing to be the goods of the Teſtator, do not charge the Executors as aſſets [g].

If (6) the Teſtator be outlawed by an outlawry for felony, then he doth not onely forfeit his goods and chattels, but alſo his Lands and Tenements, whether they be holden in fee-ſimple or for term of life [h]. And he that is thus outlawed can neither make his Teſtament of thoſe Goods nor of thoſe Lands, for they are none of his.

But if an exigent for felony be awarded againſt a man, whereby he loſeth all his goods, yet he may make an Executor to reverſe it, for there he is not attainted. *Rolls* Abridg. tit. Execut. h.

Howbeit (7) I ſuppoſe that he that is outlawed in an action perſonall may make his Teſtament of his Lands, for they are not forfeited [i]. Or if (8) he do aſſign Tutors to his Children, (as within the province of *York* and other places, by cuſtome there uſed, Parents may do [k],) the ſame aſſignation is to be confirmed [l] by the Ordinary to whom the probate of Teſtaments appertaineth. Or (9) if there be any errour or diſcontinuance in the ſuit or proceſs, by means whereof the outlawry is reverſed or annulled. Or if the party outlawed were beyond the Seas at the time of the outlawry pronounced [m]. Or if three Proclamations were not made, according to the Statute lately made in that behalf, *viz.* one in the open County Court, another at the generall Quarter ſeſſions, and the third at the Church or Chappell where the party defendant dwelleth [n]; in reſpect whereof the outlawry is reverſed and void. In theſe and like caſes the Teſtament is good, notwithſtanding ſuch outlawry. And ſo it is if pardon be obtained, and he thereby fully reſtored [o].

[f] Doct. & Stud. lib. 1. c. 6.

[g] Doct. & Stud lib. 2. c. 3. & lib. c. 6.

[h] *Terms of Law*, verb. *Utlegary*.

[i] Vide quæ ſequuntur hoc §. litera L. quo etiam tendit quod ſcripſerunt Brook tit. Gard, 9. 6. & Perkins tit. grant, fol. 6.

[k] Infra part. 3. § vij.

[l] Is enim qui noſtratibus dicitur utlegatus, parum differt à relegato: Cum relegatio (ſicut utlegatio) nihil aliud eſt, quam exilium temporarium. L. relegati. ff. de pœn. Quinimo & relegati quandoque (prout etiam utlegati) bona confiſcata ſunt. Jul. Clar. § teſtm. q. 22. Attamen non amittit teſtm. factionem relegatus quoad bona, ſi quæ ſint non confiſcata. Jul. Clar. d. q. 22. Quare ſicut relegatus, ita etiam utlegatus teſtandi facultatem retinet; ſi quid ſuperſit non proſcriptum, ſive publicatum. Porro bannitus non eſt inteſtabilis. Clar. q. 17. Denique nec deportatus ad pias cauſas. Graſſ. § teſtm. q. 17. n. 9. Multo minus efficitur utlegatus inteſtabilis, quoad ea quæ non ſunt applicanda fiſco.

[m] *Terms of Law*, verb. *Utleg.*

[n] Stat. Eliz. an. 31. c. 3.

[o] L. ſi quis. § quatenus. de injuſt. teſt. ff.

An action of debt was brought againſt A. as Executor of B. A. pleaded that B. was outlawed at the ſuit of H. after Judgement, and ſo continued outlawed when he died, and that it is in full force; and demanded judgement *ſi action, &c.* upon which plea the plaintiff demurr'd: and adjudged no plea, becauſe the plea doth not amount to more, but that he hath no goods: and ſo he anſwereth *argumentative*, and by implication. And it was holden that this plea doth not prove a Nullity of the Will, for then he might have pleaded, that he was never Executor. 49 E. 3. 5. 29 Aſſ. 63. 33 H. 6. 27. And an Adminiſtrator or Executor may have divers goods which are not forfeited to the King, as arrearages of rent upon an eſtate for life. M. 20 Jac. *Robert Bullen*, verſ. *Jervis*. T. 37 Eliz. rot. 2954. *Wolley* verſ. *Bradwell*. Huttons rep. fol. 53. 36 H. 6. 27. 21 E. 3. 5.

A man outlawed in a perſonall action may make Executors, for he may have debts upon contract which are not forfeited to the King; and thoſe Executors may have a writ of errour to reverſe the outlawry. M. 43, 44 Eliz. B. R. inter *Shaw* & *Cuttreſs*. Rolls Abridgement, tit. Executor. H. 16 E. 4. fol. 4. 9 H. 6. 20. Brook Abridgment, tit. Outlawry, pl. 49. 54. 59.

And if the Teſtator had mortgaged his land upon condition, that if the mortgagee pay not at ſuch a day to him or his Executors 100 li. that then it ſhall be lawfull for him or his heirs to re-enter, and after and before the day the Teſtator is outlawed, and makes his Executors and dies, and at the day the mortgagee pays the money to the Executors; that is aſſets, and not forfeited to the King. Hutton's rep. fol. 53.

But if A. takes a bond in another's name, and is afterwards outlawed, the King ſhall have the bond; and it ſhall not be aſſets to his Executors if he dieth. Adjudged 24 Eliz. *Birket*'s Caſe. Crok. part 2. fol. 513. The King verſ. Sir *Jo. Daccombe*'s Executors in the Exchequer.

So if Leſſee for years aſſign his term to another in truſt for himſelf, and if Leſſee for years be outlawed, this truſt will be forfeited to the King. 24 Eliz. *Armſtrong*'s Caſe. Crok. part 2. fol. 513.

§ XXII. Of an Excommunicate perſon.

1. *An Excommunicate perſon may make a Teſtament.*
2. *Saving in certain caſes.*

WHether (1) an Excommunicate perſon may make a Teſtament or not, is a queſtion which hath many patrons, both of the affirmative and negative part; howbeit the affirmative hath moe in number, and thoſe alſo greater in weight or authority [a]. And this affirmative concluſion proceedeth, although he be publickly excommunicated [b]; unleſs he be (2) excommunicate for hereſy, or manifeſt uſury, or for ſome other cauſe for the which he is prohibited to make any Teſtament [c]; or unleſſe he be excommunicate with that great curſe, which is called *Anathema*, which is not to be inflicted but upon great cauſe, with great deliberation and ſolemnity [d].

[a] Gabr. Rom. lib. 4. com. concl. tit. de teſta. concl. 1. Graſſ. Theſaur. com. op. § teſtm. q. 24. Petr. Duen. tract. reg. & fall. ubi citantur & hujus & illius opinionis Authores pene infiniti.

[b] Graſſ. & Duen. ubi ſupra.

[c] Sed an hic etiam opus ſit denunciatione, vide quæ ſuperius dicta ſunt cad. part. § 14. & § 18.

[d] Socin. Tract. reg. & fall. verb. excommunicatus.

§ XXIII.

§ XXIII. Of Prodigall perſons.

1. *Divers perſons inteſtable by the Civill Law, which are not prohibited by the Laws and cuſtoms of this Realm.*

OThers (1) alſo for other cauſes are forbidden to make their Teſtaments by the Civill Law [a]: namely prodigall perſons [b], and ſuch as are doubtfull of their ſtate of freedom or bondage [c]. The ſon alſo, ſo long as his father lived, (in whoſe power he was,) could not make a Teſtament by the Civill Law [d]. But ſeeing the Laws of our Realm are contrary, I ſhall not need to enter into any diſcourſe of that Law about theſe perſons.

[a] De quibus Vigelius in ſua method. jur. civil. lib. 9. c. 5. & 6. cum ſequentibus.
[b] L. is cui. ff. de teſta. § Item prodigus. inſt. quibus non eſt permiſſ.
[c] L. de ſtatu. de teſt. ff.
[d] L. qui in poteſtate. ff. de teſta.

§ XXIV. Of him that hath ſworn not to make a Teſtament.

1. *It is an old queſtion, whether he that hath ſworn not to make a Teſtament, may notwithſtanding make a Teſtament.*
2. *The greater part hold the affirmative.*
3. *No cautel under Heaven, whereby the liberty of making a Teſtament may be taken away.*
4. *Whether it be needfull that the Teſtator do expreſly revoke his Oath.*

IT is (1) an old queſtion, whether he that hath taken an Oath not to make a Teſtament, may notwithſtanding make a Teſtament [a]. And (2) although there were many which did hold, that in this caſe he could not make a Teſtament [b]; yet the greater number are of the contrary opinion [c], eſteeming the Oath not to be lawfull, and conſequently not of force to deprive a man of the liberty of making a Teſtament [d]. And therefore if a man firſt make a Teſtament, and then ſweareth never to revoke the ſame, yet notwithſtanding he may make another Teſtament, and thereby revoke the former *. For (3) there is no *cautel* under heaven, whereby the liberty of making or revoking his Teſtament can be utterly taken away [f]. Howbeit if (4) the Teſtator will make his Teſtament contrary to his Oath, then it is neceſſary that he revoke his Oath alſo; for the former Teſtament is not revoked, unleſſe the Oath be alſo ſpecially or expreſly revoked [g]: Or at the leaſt, mention muſt be eſpecially made of the former Teſtament, with the Oath: as for example, *I do now make this Teſtament, notwithſtanding my former*

[a] De qua q. Bar. in L. ſi quis. ff. de leg. 3. Jo. And. in c. quod ſemel. de reg. jur. 1. n. 6. Bald. in Auth. hoc inter. C. de teſta. Spec. de Inſtr. edi. § compendioſe. Verſ. quid ſi quis. Summa Hoſtienſ. tit. de ſepulturis. § an licitum. Oldrad. conſ. 127.
[b] Specul. Hoſtienſ. Oldrad. & alii ubi ſupra.
[c] Bar. in d. L. Si quis. Jul. Clar. teſtm. q. 94. Michael Graſſ. § teſt. q. 87. Soarez lib. rec. ſenten. verb. teſtm. n. 67. & hæc opinio proculdubio communis eſt, teſtimonio eorundem Clar. Graſ. Soarez.
[d] Bar. ubi ſupra. cui accedunt etiam Olden. de action. claſſ. 5. in prin. Covar. in Rub. de teſta. extr. 2. part. * Bar. Clar. Graſſ. ubi ſupr. Gabr. lib. 2. com. concl. tit. de jurejuran. concl. 1. n. 8. cum infinitis aliis.
[f] Bar. & Olden. ubi ſupra. [g] Jul. Clar. § teſtm. q. 94. Soarez l. rec. ſen. ver. teſtm. n. 67. Graſſ. § teſtm. q. 87. ubi dicit hoc eſſe valde notandum.

Teſtament, with the Oath therein contained not to revoke the ſame †. For in this caſe the former Teſtament is revoked. And ſo it is, if the ſecond Teſtament be confirmed with an Oath: for then the former Teſtament, which the Teſtator did ſwear not to revoke, is nevertheleſſe as effectually revoked, as if the Teſtator had not onely made mention of the Oath, but preciſely revoked the ſame *.

† Menoch. de præſumpt. lib. 4. præſump. 166.

* Jo. Dilect. Duran. de arte Teſtand. tit. 10. c. n. 5.

§ XXV. Of him that is at the very point of death.

1. *He that is at the point of death cannot alwaies make his Teſtament.*
2. *What if it appear that he is of perfect mind and memory?*
3. *What if his words can ſcarcely be underſtood?*
4. *What if it be doubted whether he be of perfect mind and memory?*
5. *Whether the Teſtament made at the point of death by the motion of another be good or not.*
6. *What if the perſon be ſuſpected which doth ask the queſtion?*
7. *They which be extremely ſick do eaſily anſwer (Yea) to any queſtion.*
8. *The former Teſtament is not revoked by the ſecond, made by him that is ready to die, at the interrogation of a ſuſpected perſon.*
9. *Whether the Teſtament be good which is made at the interrogation of a perſon not ſuſpected.*
10. *What if the ſick man's meaning do not appear but by his bare anſwer?*
11. *Whether that Teſtament be good, which is written by the Kinſfolks of the ſick man, and afterwards read unto him, and he being demanded whether he be content to have the ſame ſtand for his Will, anſwereth (Yea.)*

WHether (1) he that is at the very point of death may make a Teſtament, or whether the Teſtament made by him when he is half dead be good or no, may be known by theſe caſes following.

The firſt caſe is, when a man is ſo extreamly ſick, that he is well-nigh dead, yet (2) nevertheleſſe it appeareth undoubtedly, by his geſtures and ſenſible ſpeeches, that he is of good underſtanding and ſound memory. In this caſe there is no queſtion but he may make his Teſtament [a]: for the integrity of the mind, and not of the body, is required in the Teſtator [b]; and the liberty of making a Teſtament doth continue even untill the laſt gaſp [c]. Inſomuch that (3) if the Teſtator be not able to pronounce his words ſo plainly and diſtinctly as he had been accuſtomed, but ſcarcely and with great difficulty can be underſtood of ſuch as be preſent, (his tongue perhaps being ſwoln or become ſtiff; and he unruly, or otherwiſe diſturbed by means of his ſickneſſe;) yet doth not the Teſtament therefore loſe his force or virtue [d].

[a] L. quoniam indignum. C. de teſta. & DD. ibidem. Mantic. de conject. ult. vol. lib. 2. tit. 6. Simo de Prætis de interp. ult. vol. lib. 2. dub. ult. ſoluc. 4.
[b] L. 2. ff. de teſta. L. ſenium. C. qui teſta. fac. poſſ.
[c] L. 4. de adimen. leg. ff.
[d] d. L. quoniam indignum. Simo de Prætis ubi ſupra. Phil. Franc. in Rub. de teſta. lib. 6. Alex. conſil. 33. vol. 3. n. 7.

The

The ſecond caſe is, (4) when a man is at the point of death, but it doth not appear plainly whether he be of perfect mind and memory. In which caſe ſome are of opinion, that nevertheleſs he is to be preſumed of perfect mind and memory *. Others are of the contrary opinion, comparing him that is in this caſe to a dead man, partly through the intolerable extremity of the ſickneſs, and partly through the cogitation of imminent death [f]. Others, more indifferent, do reconcile theſe contrary opinions, with this diſtinction: either the ſick perſon doth ſpeak ſo diſtinctly as he may be underſtood, and then he is preſumed to be of perfect mind and memory, and ſo to be in that caſe that he may make his Teſtament; or elſe he cannot ſpeak ſo diſtinctly as he may be underſtood, and then he is not in caſe to make his Teſtament [g].

* Panor. in c. fin. de ſucceſſ. ab inteſtat. extr. n. 9.

[f] Paul. de caſtr. conſil. 155. vol. 1.

[g] DD. in L. jubemus. C. de teſta. Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 5. Viglius in § ſed cum paulatim. Inſtit. de teſt. ord. ubi hoc diſtinctionum fœdere conciliat iſtas contrarias leges, nempe L. quoniam indignum, & L. jubemus, C. de teſta.

The third caſe is, (5) when he that is at the point of death, and hardly able to ſpeak ſo as he may be underſtood, doth not of his own accord make or declare his Teſtament; but at the interrogation of ſome other, demanding of him whether he make this or that perſon his Executor, and whether he give ſuch a thing to ſuch a perſon, anſwereth, Yea, or, I do ſo. In which caſe it is a queſtion of ſome difficulty, whether the Teſtament be good or not: neither can it be anſwered ſimply, either negatively or affirmatively, but diverſly in divers reſpects [h]. For (6) if he which doth ask the queſtion of the Teſtator be a ſuſpected perſon [i], or be importunate to have the Teſtator to ſpeak [k], or make requeſt to his own commodity [l]; as if he ſay, Do you make me your Executor? or, Do you give this or that? and thereupon the Teſtator anſwer, Yea: in this caſe, it is to be preſumed that the Teſtator did anſwer Yea, rather to deliver himſelf of the importunity of the demandant, then upon devotion or intent to make his will [m]; becauſe it (7) is for the moſt part painfull and grievous to thoſe that be in that extremity, to ſpeak, or be demanded any queſtion, and therefore they are ready to anſwer (Yea) to any queſtion almoſt [n], that they may be quiet. Which advantage crafty and covetous perſons knowing very well, are then moſt buſie, and do labour with tooth and nail to procure the ſick perſon to yield to their demands, when they perceive he cannot eaſily reſiſt them, neither hath time to revoke the ſame afterwards, being then paſſing to another world [o]. And therefore worthily and with great equity and reaſon is that to be deemed for no Teſtament, when the ſick perſon anſwereth Yea, the interrogation being made by a ſuſpected perſon; as well in reſpect of preſumption of deceit in the one, as of defect of

[h] De hac q. conſulas velim Mantic. de conject. ult. vol. l. 2. tit. 6. & Gab. Rom. l. 4. com. concluſ. tit. de teſtam. concl. 2. ubi non paucis contentus eſt diſtinctionibus.

[i] Paul. de Caſtr. conſil. 155. col. pen. vol. 1. Zaſ. conſ. 3. vol. 1. n. 37. Socin. Jun. conſil. 183. n. 27. vol. 2. qui refert hanc opin. eſſe magis com.

[k] Zaſ. d. conſ. 3. n. 37. vol. 1. ubi attеſtatur hanc op. eſſe com.

[l] Socin. d. conſil. 183. vol. 2. n. 39. Sichard. in L. jubemus. C. de teſta. n. 7. in fin.

[m] Paul. de Caſtr. in L. hac conſultiſſima. § at cum humana. c. qui teſta. fac. poſ. Mantic. de conject. ult. vol. l. 2. tit. 6. n. 10. Socin. Jun. conſil. 144. vol. 2. n. 29. Sichard. in d. L. jubemus. C. de teſta. n. 7. Peckius tract. de teſta. conjug. lib. 1. c. 17.

[n] Hic, cui moribundus (ait Alex.) reſponderet Ita, etiam ſi interrogares num interfeciſſet hominem. conſ. 33. vol. 3.

[o] d. L. jubemus. & DD. ibid.

meaning of making of a Teſtament in the other [p]. And (8) this is true eſpecially, when there is another former Teſtament; for that is not to be revoked by a ſecond Teſtament made at the interrogation of another, in manner aforeſaid [q].

[p] Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 9. Covar. in c. cum tibi. de teſta. ext. n. 4. Peckius d. c. 17. n. 2.

[q] Socin. Jun. d. conſil. 183. n. 34. Zaſ. d. conſ. 3. n. 4. Mollneus in addic. ad conſil. Decii 489. ubi non dubitat affirmare, Decium & alios contrarium conſil. peſſime conſuluiſſe. Adde Menoch. de præſump. l. 4. fol. 67. verb. quartum. qui hoc dictum temperat, & Decium ſalvat diſtinctionis ope.

39 H. 8. a Monk came to a Gentleman (who was then *in extremis*) to make his will. The Monk asked the Gentleman if he would give ſuch a Mannor and Lordſhip to his Monaſtery. The Gentleman anſwered, Yea. Then, if he would give ſuch and ſuch eſtates to ſuch and ſuch pious uſes. The Gentleman anſwered, Yea, to them all. The heir at law obſerving the Covetouſneſs of the Monk, and that all the eſtate would be given from him, asked the Teſtator, if the Monk was not a very Knave: who anſwered, Yea. Afterward the will came in queſtion, and at a triall, for the reaſons aboveſaid, it was adjudged no will.

But (9) if the perſon which maketh the motion be not any way ſuſpected, and it doth appear withall by ſome conjectures that the ſick perſon had a deſire to make his Will; as if the ſick perſon ſend for his friend, who being come unto him, asketh him whether he make this or that man his Executor, which otherwiſe were to have the adminiſtration of his goods if he died inteſtate; to whom the ſick perſon anſwereth, Yea, or, I do make him my executor: in this caſe this Teſtament is good [r], albeit it were in prejudice of another Teſtament made before †. But (10) what if it do not appear by any conjecture, that the Teſtator had a meaning to make his Teſtament, and yet no ſuſpicion can be conceived againſt the perſon which demanded the queſtion? whether is the Teſtament good, if the Teſtator do onely anſwer, Yea? I ſuppoſe, that without ſome conjecture of the Teſtator's meaning, it is not ſufficient [t]. And though ſome of good authority do ſeem to hold the contrary, and that it is ſufficient *; yet I do take it, that this opinion ought to take place, whenas it doth appear ſufficiently that the Teſtator was of ſound memory, notwithſtanding the extremity of ſickneſs and propinquity of death †.

[r] Zaſ. d. conſil. 3. n. 37. Socin. Jun. d. conſil. 183. n. 31. Covar. in d. c. cum tibi, n. 4. Peckius d. c. 17. n. 5.

† Dec. d. conſil. 489 Socin. Jun. conſil. 144. vol. 2. n. 44, 45.

[t] Mantic. de conject. ult. vol. lib. . . tit. 6. n. 9. Socin. Jun. conſ. 183. vol. 2. n. 6. 37.

* Menoch. tract. de præſum. ibid. lib. 4. præſump. 8. n. 28. † Menoch. d. præſump. 8. n. 24. verſic. ſecundus caſus ubi extat. 6. Quod cum teſtator vere ſanæ mentis eſt, etſi corpore æger atque infirmus jacet, valet ipſius teſtamentum ad alterius interrogationem conditum: cujus regulæ extenſio tertia eſt, etiamſi non conſtaret hunc teſtatorem, ante hanc interrogationem, habuiſſe animum teſtandi.

The fourth caſe is, when the (11) ſick man's kinſfolks, or ſome other perſons, do cauſe a Teſtament to be written, after their inditing, (the ſick man as yet not knowing thereof,) and then afterwards the ſame being read unto him, and he being demanded, whether the ſame ſhall ſtand for his Teſtament, anſwereth, Yea, and ſhortly after dieth. In this caſe the Teſtament is not good [v], unleſs the Teſtator had firſt

[v] Mantic. de conject. ult. vol. l. 2. tit. 6. n. 10. qui dicit hanc op. eſſe magis com. Covar. in d. c. cum tibi. n. 4.

uttered

uttered his meaning to the Writer or inditer thereof [x], or had requeſted them to write his Will [y]; or unleſs the Teſtator, being of good mind and memory, had by plain and expreſs words, or other apparent conjectures, confirmed the ſame, and not onely by anſwering Yea [z].

But what if a Will be brought to the ſick man, which being read over in his hearing, and he demanded whether the ſame ſhall ſtand for his laſt Will and Teſtament, anſwereth, Yea; and it doth not appear whether the ſame was written and prepared by the direction of the ſick man, or elſe of his kinsfolks and friends? whether is it to be preſumed to have been prepared by his direction, or by theirs? It ſeemeth, by the ſick man, in favour of the Teſtament [a]. But when it appeareth indeed to have been made ready by others; then, albeit the Teſtator being interrogated do anſwer as before, it is preſumed that the queſtion was made by the ſuggeſtion or on-ſetting of the Executor [b], and ſo the Teſtament is not good, as is aforeſaid.

[x] Sichard. in L. jubemus. C. de teſta. n. 7. Gabr. lib. 4. com. concluſ. tit. de teſta. concl. 2. n. 13. 17.
[y] Gabriel ubi ſupra.
[z] Mantic. de conject. ult. vol. tit. 6. in fin.
[a] Alex. conſil. 33. vol. 3. Gabr. l. 4. tit. de teſta. concl. 2. n. 15. Menoch. d. l. 4. fol. 56. n. 6.
[b] Mantic. de conject. ult. vol. 2. tit. 6. n. 10.

§ XXVI. Of Eccleſiaſticall perſons.

1. *Two ſorts of Eccleſiaſticall perſons, Regular, and Secular.*
2. *Who are meant by Regular perſons.*
3. *Religious perſons compared to bond-men.*
4. *Religious perſons compared to dead men.*
5. *Who be here meant by Secular Clerks.*
6. *Eccleſiaſticall perſons are not ſimply prohibited to make their Teſtaments.*
7. *Eccleſiaſticall perſons may make their Teſtaments of all goods which they have not in right of their Church.*
8. *Eccleſiaſticall perſons cannot make their Teſtaments of things immovable which they poſſeſs in right of their Church.*
9. *An Eccleſiaſticall perſon may make his Teſtament of the glebe by him ſown.*
10. *Whether an Eccleſiaſticall perſon may make his Teſtament of the fruits not received.*
11. *All fruits which happen during the vacation are due to the next Incumbent.*
12. *Whether an Eccleſiaſticall perſon may make his Teſtament of all movable goods which he hath in right of his Church.*
13. *Some caſes wherein Eccleſiaſticall perſons cannot diſpoſe of their goods.*

OF (1) Eccleſiaſticall perſons there be two ſorts, the one *Regular*, the other *Secular* [a]. By *Regular* (2) I do underſtand Monks, Friers, and other Religious perſons [b]; whereof becauſe we have none this day in the Church of *England*, I ſhall not need to enter into any diſcourſe concerning them. Onely this by the way, that (3) theſe Religious perſons, in reſpect of their canonicall obeiſance vowed unto their Abbots and Prelates, are in Law compared unto bond-men [c], and (4) in

[a] c. duo. 12. q. 1. gloſſ. in Rub. de regularibus extr.
[b] c. 2. de teſta. extr.
[c] Specul. de ſtatu Monach.

(4) in reſpect of their vow of perpetuall poverty, or renouncing the world, they are compared unto dead men [d]: and in theſe reſpects they could not make a Teſtament *. But if a Religious man had made a Teſtament before his entrance into that profeſſion, then was the ſame to have been proved and executed, as if he had been naturally dead [f]: and if he had made no Teſtament when he had entred into religion, then the Ordinary might have committed the adminiſtration of his goods, as of one that had died inteſtate [g]. But it was and is otherwiſe with ſecular Clerks, who albeit they be ſometimes comprehended under the name of religious perſons [h]; yet the law diſpoſeth otherwiſe concerning their Teſtaments then of the Teſtaments of religious perſons [i].

[d] Littleton tit. villenage, circa medium.
* Quod ſi quis ſcire cupiat, an & quatenus Monachus ſit teſtabilis, legat Jul. Clar. § teſtm. 28, 29, 30. Michael Graſſ. § teſtm. q. 34. & Ferdinan. Vaſq. de ſucceſſ. progreſſ. lib. 1. §j.
[f] Littleton ubi ſupra.
[g] Ibidem. Adde Benedictum in rep. c. Ranutius de c. Teſta. & n. 1. fol. 67.
[h] Panor. in Rub. de regular. extr.
[i] Ut ſtatim ſequitur hoc §.

By (5) *Secular* Clerks I underſtand Archbiſhops, Biſhops, Deans, Archdeacons, Prebendaries, Parſons, Vicars, and other Eccleſiaſticall Miniſters or Clergie-men [k]. Theſe perſons (6) are in ſome reſpects prohibited to make their Teſtaments, but they are not ſimply forbidden [l]. Wherefore that we may the better know when they may make a Teſtament, and when they may not; we are firſt to conſider whether the things whereof they make their Teſtaments do belong unto them in any other reſpect then in right of the Church, or of their Eccleſiaſticall living [m].

[k] Michael Graſ. Theſaur. com. op. § teſtm. q. 34. Jul. Clar. § teſtm. q. 27.
[l] c. 1. c. cum in officiis. c. relatum. el. 2. c. requiſiſti. de teſta. extr. Covar. in d. c. 1.
[m] Ita diſtinguitur in d. c. relatum. el. 2.

For (7) of other things then ſuch as are gotten by right of the Church, whether the ſame be left unto them by their Parents, or given by ſome friend, or whether they got the ſame by their own induſtry, either by preaching of the Goſpel, or by teaching of Scholars, or other labour [n], of ſuch things they may freely diſpoſe and make their Teſtaments, as well as lay-perſons [o]: although the ſame be given or gotten after they be entred into the Miniſtery, and alſo after they have obtained ſuch ſpirituall promotion [p].

[n] Panor. in d. c. relatum. el. 2. de teſta. extr. Flores ult. vol. part. 1. fol. 4.
[o] d. c. 1. de teſta. extr. & Covar. ibidem. Graſſ. § teſtm. q. 34. Perkins tit. deviſes, c. 8. in prin.
[p] Cyn. & alii in Authen. licentiam. C. de Epiſcopis & Cler. Graſſ. d. § teſtm. q. 34. n. 2.

If any thing do appertain unto them in right of their Church, then we are to conſider whether the ſame be *movable* or not. For (8) of *immovable* things, as of houſes, or of demeans, or of glebe, and ſuch like, Eccleſiaſticall perſons cannot diſpoſe by their Teſtaments [q]; nor of the trees or fruits growing upon the ſame demeans, or glebe [r]: ſaving (9) where the incumbent, before his death, hath cauſed any of his Glebe-lands to be manured and ſown at his proper coſts and charges with any corn or grain: for in this caſe ſuch incumbent may make and declare his Teſtament of all the profits of the corn growing upon the ſame Glebe-lands ſo manured and ſown, by force of the ſtatutes of this Realm *. Which ſtatute is agreeable to the cuſtome of other Nations, namely of *France* and of *Spain*: the generall cuſtome of which Countries is, that all ſecular Clerks may freely diſpoſe of the fruits and profits

[q] L. jubemus. C. de ſacroſan. Eccleſ. c. cum in officiis. c. relatum. el. 2. de teſtm. extr. Perkins tit. deviſes, in princ.
[r] Perkins ubi ſupra. Epiſtola cujuſdam libri qui inſcribitur, *An anſwer to an Abſtract.*
* Stat. H. 8. Anno 28. c. 11.

profits ariſing out of their Benefices, not onely by alienating the ſame whileſt they be yet living, by way of bargain and ſale, or other contracts; but alſo by deviſing or bequeathing the ſame in their laſt Wills and Teſtaments †. Inſomuch that if the ſaid ſecular Clerks ſhould not alienate the ſame in their life-time, nor deviſe the ſame by their laſt Will, but die inteſtate; yet, by the ſaid cuſtome, their ſucceſſours in their benefices ſhould not reap the ſame ‖. Which thing is alſo obſerved here in *England*, where Clergy-men dying inteſtate, the adminiſtration of their goods is uſually committed, as of other lay-perſons; by force of which adminiſtration, the ſaid adminiſtrators enter to all thoſe goods and chattels whereof the ſaid Clergy-men dying might make their Wills *. And although (10) heretofore, as well by generall cuſtome of this Realm [t], as by ſpeciall conſtitution [v], it was lawfull for Parſons and Vicars, after the feaſt of the Annunciation of the bleſſed Virgin [x], and in ſome places after the Feaſt of S. *Mark* [y], to make their Teſtaments of the fruits of their livings, albeit not as yet received, but paiable that year or the harveſt following: nevertheleſs by the ſtatutes of this Realm ſuch cuſtome and conſtitution is taken away: by which ſtatute [z], (11) all fruits, tithes, oblations, and other emoluments whatſoever belonging to any Archdeaconry, Deanry, Prebend, Parſonage, Vicarage, Hoſpitall, Wardenſhip, Provoſtſhip, or other ſpirituall promotion, benefice, dignity or office, (Chaunteries onely excepted,) growing, riſing or coming, during the time of the vacation of the ſame ſpirituall promotion, belong to the next Incumbent, and to his Executors, towards the paiment of the firſt-fruits.

† Sarmient. Tract. de reddit. eccleſiaſt. c. 6. & c. 8. Veruntamen dicta conſuetudo non complectitur Epiſcopos; illi enim de fructibus Eccleſiaſticis per viam ultimæ voluntatis non diſponunt.

‖ Sarmient. ubi ſup. Excipiuntur tamen Epiſcopi; nam quoad hos ſervatur jus commune Eccleſiaſticum ſive Canonicum.

* Id quod nemo neſcit verſatus in negotiis forenſibus.

[t] Lindw. in. c. nullus rector. de conſuetud. lib. 1. provincial. conſtituc. Cant.

[v] c. cum inter rectores. tit. de conſuetud. lib. 1. provincial. conſtituc. Ebor.

[x] d. c. nullus.

[y] d. c. cum inter rectores. l. 1. provincial. conſtit. Eborac. [z] d. Stat. H. 8. an. 28. c. 11.

Of goods (12) *movable* which an Eccleſiaſticall perſon poſſeſſeth, albeit the ſame were gotten in right of the Church, or by means of his Eccleſiaſticall living, he may make his Teſtament, like as of any other his temporall goods [a]; whether ſuch Eccleſiaſticall perſon be Biſhop, Dean, Archdeacon, Prebendary, Parſon, or Vicar, or otherwiſe termed or intituled, certain caſes onely excepted [b]. *Viz.* (13) of goods which a Biſhop hath common with a Dean or Chapter [c], or which a Dean or Chapter have common to themſelves [d]; or which a Maſter or brethren of an Hoſpitall or Colledge have alſo amongſt themſelves, in the right of their houſe *; or of goods which are dedicated to the Service of God, as ornaments of the Church [f]; or of the Eccleſiaſticall rights not received, or not due nor paiable in the time of the incumbency of the Teſtator, but reſerved to the next incumbent [g]: In which caſes it is not lawfull for Eccleſiaſticall perſons to make their Teſtaments of ſuch goods; which caſes excepted, it is lawfull for an Eccleſiaſticall perſon to declare his Will [h], either of the goods themſelves, (if they remain and are extant,) or of the mony taken for the ſame being ſold or alienated [i].

[a] Lindw. in d. c. nullus. verb. legata. Doct. & Stud. lib. 2. c. 39, 40. Quod verum quidem eſt jure ſeu conſuetudine hujus regni Angliæ: ſed attento jure cano non procedit indiſtincte. Abb. in d. c. relatum. el. 2. de teſt. extr.

[b] Jul. Clar. § teſtm. q. 27. Graſſ. § teſtm. q. 34.

[c] c. relatum. el. 2. de teſta. extr. Perkins tit. deviſes, in princ. Doc. & Stud. lib. 2. c. 39.

[d] Fitzh. Abridg. tit. teſtm. n. 1.

* Perkins Doct. & Stud. ubi ſupra. [f] Etymologia eſt, quia hujuſmodi rerum nullum eſt commercium. § nullius. Inſtit. de rerum à juſ. [g] d. Stat. H. 8. an. 28. c. 11. [h] Exceptio enim firmat regulam in non excepti Dec. in L. 1. de reg. jur. ff. [i] Stud. verum jure quo nos utimur: artic. 1. cler. c. 1. Doct. & Stud. lib. 2. c. 39. Secus jure can. Panor. in d. c. relatum. el. 2. n. 3. Graſſ. d. § teſtm. q. 34. Jul. Clar. § teſtm. q. 27.

It appeareth by many Records in the Reigns of H. 3. and E. 1. that by the law and cuſtome of *England* no Biſhop could make his will of his goods or chattels coming of his Biſhoprick, *&c.* without the King's licence. (*a*) The Biſhops, that they might freely make their wills, yielded to give to the King after their deceaſes reſpectively for ever ſix things: 1. their beſt Horſe or Palfry with bridle and ſaddle, 2. a Cloak with a Cape, 3. one Cup with a Cover, 4. one Baſon and Ewer, 5. one Ring of gold, 6. his Kennel of hounds. For theſe a writ iſſueth out of the Exchequer after the deceaſe of every Biſhop. This duty is ſometimes called *Multura* or *Multura de Epiſcopis*, ſometimes *Menutier*, &c.

(*a*) Rot. clauſ. 30 H. 3. m. 4. Thomas de Stanford. Rot. pat. 13 E. 1. m. 21. Rex licentiam dedit Epiſc. Bangor. Inter Com. de H. 2 E. 2. in Scacc. proces verſ. Epiſcop. de Bath & Wells 21 E. 3. fo. 60. Inſtitut. part. 4. fo. 338.

§ XXVII. Of Kings.

1. *Examples borrowed out of the Old Teſtament, whereby it may ſeem lawfull for Kings to give away their Kingdoms.*
2. *Certain humane reaſons tending to the ſame purpoſe.*
3. *Other examples taken out of the prophane hiſtories, of Kings which have diſpoſed of their Kingdoms by their Teſtaments.*
4. *By the Civill and Canon Laws, a King cannot give away his Kingdome.*
5. *Whether by the Laws of this Realm a King may give away his Kingdome.*
6. *An uncertain Concluſion.*

IT may ſeem lawfull for a King by his Teſtament to make his heir whomſoever he ſhall think good, or to leave his Kingdome to whom he will, both by God's law and man's law.

By God's Law, becauſe (1) *Moſes*, a man to whom God did ſpeak as it were face to face, left the principality or government of the *Iſraelites* to *Joſua* [a], being of the Tribe of *Ephraim* [b], and not to any of his own Tribe, which was the Tribe of *Levi* [c]. King *David* likewiſe, a man after God's own heart, did beſtow the Kingdom on *Solomon* [d], having the ſame time an elder Son, namely, *Adoniah* *. The ſame *Solomon*, the wiſeſt man that ever was or ſhall be [f], whiles he reigned as King, did give unto *Hiram* King of *Tyrus* twenty Cities of the Kingdome of *Iſrael*, ſituate in the Land of *Galilee* [g]. The holy Patriarch *Jacob* alſo, even he that wraſtled with an Angel [h], deprived his eldeſt Son *Ruben* of his birth-right, and gave the ſame to the Sons of *Joſeph* [i].

[a] Deut. c. ult. verſ. 9.
[b] Gloſſ. in c. Moſes. 8. q. 1.
[c] Phil. Franc. in Rub. de teſtam. lib. 6. poſt gloſſ. in d. c. Moſes.
[d] Lib. 1 Reg. c. 1. verſic. 28. cum ſequent.
* eod. c. verſic. 41. cum ſequent.
[f] 1 Reg. c. 3. verſ. 12.
[g] 1 Reg. c. 9. verſ. 11.
[h] Geneſ. c. 32. verſ. 24, &c. [i] Gen. c. 49. 1 Paralip. c. 5. in princ.

By man's Law, becauſe (2) the voice and will of a Prince hath the force of a Law [k]; becauſe alſo a King is ſaid to be a mortall God [l];

[k] § ſed & quod. Inſtit. de jur. na gen. & civil. [l] Bald. in § præterea. de prohib. alienac. feud. per Fœder. n. 14. Pſal. 82. verſ. 6.

and

and therefore what he commandeth ought to be obeyed without reſiſtence [m], if it do not repugn the Law of God immortall [n]. To be ſhort, if a King might not diſpoſe of his own Kingdome at his own pleaſure, then his ſtate were not ſo good as the ſtate of his ſubject [o]; for the meaneſt ſubject may freely diſpoſe of his own [p]. Beſides which urgent reaſons, whereby appeareth the root and life of this humane Law, there be ſundry pregnant (3) examples, which, as branches ſpringing from that lively root, have in ſundrie Ages and Countries brought forth fair and good fruit; whereby the force and efficacy of that Law hath been made manifeſt to all the World. Let theſe few ſuffice for a taſte. It is recorded that *Attalus*, a King in *Aſia* the leſs, did in his Teſtament inſtitute the *Roman* people his heir, who by virtue of that Teſtament did enjoy the Kingdome [q]. Likewiſe that *Alexander* King of *Ægypt* did bequeath unto the ſame *Roman* people the Kingdome of *Alexandria* and *Ægypt* [r]. *Ptolemæus* the King of *Ægypt* gave away the Kingdome of the *Cyrenes* †. *Unguinus* was King of the *Goths* by the appointment of *Haldanus* [t]. To come nearer, (I mean in reſpect of place, not of time,) we may reade how *Praſutagus*, one of the Kings of this Realm of *England*, a little after the death of *Chriſt*, did make the Emperour *Nero* his heir [v]. And divers other Kings have done the like [x]. So that it is neither new nor ſtrange, that Kings have by their Teſtaments given away their Kingdoms from thoſe who otherwiſe ſhould have enjoyed the ſame.

Notwithſtanding, (4) as well by the Civill Law [y] as by the Canon Law [z], (with the which Laws the (5) Laws of this our Realm of *England* do in this point ſeem to joyn hands [a],) it is unlawfull for a King to give away his Kingdome from his lawfull heirs; for the confirmation whereof divers Writers uſe divers reaſons [b].

[m] Fald. in auth. hoc amplius. C. de fideicom. n. 10. quem velim videas.
[n] Act. Apoſt. c. 4. verſ. 19. & c. 5. verſ. 29.
[o] Oldr. conſil. 94. in fin.
[p] Supra ead. part. in prin.
[q] Florus l. 2. Hottom. illuſtr. quæſt. c. 1.
[r] Cicero Orat. 1. pro lege agrar. alias lib. 2. c. 15.
† Hottoman. d. c. 1.
[t] Eodem loci.
[v] Cornel. Tacitus l. 14. Camden. fol. 290. alias fol. 355.
[x] Quorum meminit Gentilis diſp. 2. fol. 45.
[y] Bar. & Angel. in L. prohibere. § plane. ff. quod vi aut clam. Jaſ. in L. debitorum. C. de pactis. Fald. in procem. de feudis, n. 32. Vaſq. de ſucceſ. crea. § 26. lin. 3.
[z] Innocen. Cardinal. Imol. Panor. Jo. de Anan. & alii in c. intellecto. de jurejur. extr. Felin. in c. dilecti. de major. & ob. extr.
[a] Fitzh. Abridg. tit. deviſe, n. 5. tit. execut. n. 108. hiſce verbis: L' opinion de pluis Juſtices & Doctors del Canon & Civill ley, aſſembles in le Eſchequer chambre, quant Roy Henry quart moruſt, fuit que il puit faier teſtm' & legacy des biens que il aver; mez dez biens de Royalme, ceſt aſſavoyer ancient Corone & Juels, il ne puit. Eodem tendunt quæ à Guliel. Lamberto, viro doctiſſimo, tranſcripta ſunt, ſub hac verborum ſerie: Debet vero de jure rex omnes terras & honores, omnes dignitates, & jura, & libertates Coronæ regni hujus, in integrum cum omni integritate & ſine diminutione ſervare & defendere, &c. lib. de priſcis Angl. legib. tit. de reg. offic. fol. 130.
[b] De hac quæſtione conſulas Franc. Hotto. Juriſconſultorum omnium, quos iſta peperit ætas, celeberrimum, lib. 1. illuſtr. quæſt. c. 1.

The Biſhops, Lords and Commons aſſented in full Parliament, that the King, his Heirs and Succeſſors might lawfully make their Teſtaments, and that execution ſhould be done of the ſame; whereof ſome doubt was made before. (*a*) See rot. parl. 1 H. 5. n. 13. the teſtament of King H. 4. and his Executors refuſed, the Archbiſhop of *Canterbury* was to grant adminiſtration, with the Teſtament annexed to the ſame. See 1 H. 6. n. 18. the laſt will and Teſtament of H. 5. 10 H. 6. n. 27.

(*a*) Rot. parl. 16 R. 2. n. 10. 1 H. 5. n. 13. 1 H. 6. n. 18. 10 H. 6. n. 27. Inſt. part. 4. fo. 335. a.

But (6) amongſt all their reaſons, I ſee no reaſon to induce me to adventure any farther into the examination of this deep and dangerous

queſtion; much leſs to proceed to the concluſion: not onely becauſe the ſame, being ſo high an object, doth far exceed the ſlender capacity of a mean ſubject; but alſo for that this Princely controverſy, as it hath ſeldome received ordinary triall heretofore, ſo hereafter, if the caſe were to be argued in very deed, very likely it is to be urged with more violent arguments and ſharp ſyllogiſms, then by the unbloudy blows of bare words, or the weak weapons of inſtruments made of paper and parchment; and on the other ſide, to be anſwered with flat denials of greater force, and diſtinctions of greater efficacy, then can proceed from any legall or logicall engine; and in the end to be decided and ruled by the dead ſtroke of uncivill and martiall Cannons, rather then by any rule of the Civill or Canon Law.

Videant quorum intereſt.

WHAT

WHAT THINGS MAY BE DEVISED BY WILL.

The Third Part.

§ I.

1. *The Third principall Part divided into two numbers.*
2. *The first member threefold.*

IN the (1) Third Part of this Testamentary Treatise, there is to be shewed, first *what things*, and then *how much*, the Testator may dispose or devise by his Testament.

Concerning the (2) former of these, it shall not be amiss to speak first of the bequeathing or devising of *Lands, Tenements and Hereditaments* [a]; secondly, of the bequeathing or devising of *Goods and Chattells* [b]; and thirdly, of the *committing of the Tuition of children*, and custody of their portions and rights during their minorities [c].

[a] Infra ead. part. §§. 2, 3, 4.
[b] Infra ead. part. §§. 5, 6.
[c] Infra ead. part. §§. 7, 8, &c.

§ II. Of the devise of Lands.

1. *The rule of the devise of Lands is negative.*
2. *The exceptions of this rule are of two sorts.*

TRue it is, that this matter of the devise of Lands, Tenements and Hereditaments, within this Realm of *England*, with all questions incident thereunto, is to be determined according to the Laws temporall

porall of this Realm, and is not ſubject to the rules and deciſions of the Laws Civill or Eccleſiaſticall. Leſt therefore, whilſt I would ſeem a meer profeſſour of the Civill Law, I might ſeem altogether to neglect both Law and civility, by thruſting my ſickle into another's harveſt, and ſetting my foot in another's poſſeſſions, without licence firſt obtained: for the avoiding of this offence, before I goe any farther, I am to crave this favour, (learned Profeſſours, and ſerious Students of the Laws temporall of this Realm,) that foraſmuch as this your field, wherein grow all theſe queſtions concerning the deviſe of Lands, doth lie ſo juſt betwixt me and thoſe other grounds wherein the mark whereat I aim is placed, and wherein the fruit which I would gladly utter is planted, ſo that I cannot (as now my journey lieth) have ready acceſſe unto the one, but through the other; it would therefore pleaſe you, give me a little leave to walk through a corner of your large Dominions, unto thoſe foreſaid places more proper to them of mine own profeſſion. Your Territories, I confeſſe, are very fertile, and full of hidden Treaſures; the fruit alſo of that ſoil, I mean the golden Caſes, much like the Golden Fleece of *Colchos*; the growing very pleaſant and profitable: howbeit you need not be afraid of any prejudice: for neither will I diſturb your quiet poſſeſſion with any long abode; neither can I, if I would, convey away the riches you ſhould reap, by diſcloſing of the myſteries of your gainfull art, to me unknown, unleſs I would ſeem to be more bold then blind Bayard, more arrogant then the ignorant Cobler, who for his ſaucineſſe received this admonition, (*Ne ſutor ultra crepidam.*) And farther, that, as a poor paſſenger, I may be allowed to take a taſte of thoſe things which you have ſet abroach to all the world, and which by your ſundry books you have made common to all Travellers; the rather for that I am prepared in ſome ſort to requite the ſame. This onely I deſire, and this I hope you will not deny. To the purpoſe therefore.

Touching (1) the bequeſt or deviſe of Lands, Tenements and Hereditaments, this appeareth to be a true poſition, and ground agreeable to the Civill Law [a]; and alſo the Laws of this Realm [b], That Lands, Tenements or Hereditaments, cannot be diſpoſed or deviſed by will, but in (2) certain caſes: of which ſome are approved by force of certain *Cuſtoms* [c] within this Realm; and ſome by force of certain *Statutes* [d].

[a] c. Imperialis. de prohib. feud. alien. l. 2. Feud. Bald. in c. 1. de ſucceſſ. feud.

[b] Stat. H. 8. an. 27. c. 10. in princ. Doct. & Stud. l. 1. c. 8. Perkins, tit. deviſe 102.

[c] Infra § prox.

[d] Infra eod. part. § 4.

§ III.

§ III. Certain caſes approved by Cuſtome, wherein it is lawfull to deviſe Lands, Tenements or Hereditaments.

1. *Gavel-kind-Lands may be deviſed by Will.*
2. *The cauſe wherefore the cuſtome of Gavel-kind did continue.*
3. *Burgage-Lands deviſable by Will.*
4. *To whom and after what manner Burgage-Lands be deviſable.*
5. *Whether any other perſon may deviſe Burgage-Lands but a Citizen.*
6. *Burgage-tenure a kind of tenure in Soccage.*
7. *Whether livery of ſeiſin be needfull, where Burgage-Land is deviſed.*
8. *Whether the joyntenant may bequeath his part of Burgage-Land otherwiſe deviſable.*
9. *Of Lands deviſed to certain uſes.*
10. *The cuſtome of deviſing Lands to feoffees reformed.*
11. *The cauſe of this reformation.*
12. *The ſtatute or act of reformation.*

THe (1) firſt caſe wherein by cuſtome of this Realm of *England* it is lawfull for a man by his laſt Will or Teſtament to deviſe or bequeath Lands, Tenements or Hereditaments, is this, namely, When Lands, Tenements or Hereditaments are holden in *Gavel-kind:* for ſuch Lands, Tenements or Hereditaments, by ancient cuſtome, may be given or deviſed by will [a], (the ſame otherwiſe being duly made.) For (2) after that *William* Duke of *Normandy* had invaded and conquered all *England*, *Kent* onely excepted, at laſt alſo the *Kentiſh*-men yielded, but upon condition, that they might enjoy their ancient cuſtomes of *Gavel-kind*; which was granted unto them, and ſince hath continued [b]. Amongſt which cuſtoms, being very large and beneficiall, this is one; That they which hold Lands in *Gavel-kind*, may give and ſell the ſame without licence asked of their Lords; ſaving unto the Lords the rents and ſervices due out of the ſame Tenements [c].

The (3) ſecond caſe is, When the Lands or Tenements be holden in Burgage-tenure [d]. For it is the cuſtome of divers Cities and Boroughs of this Land, (as in *London*, *York*, *Oxford*, &c.) (4) that ſuch perſons as are ſeiſed of Lands, Tenements or Hereditaments, lying and being in ſuch Cities or Boroughs, as hold the ſame in Burgage-tenure, may by their Teſtaments or laſt Wills give or bequeath the ſame to whom they will *, to hold in fee-ſimple, or in fee-tail, or for life, or years, or otherwiſe: and ſuch bequeſt or deviſe is good [f], the Will being lawfully made, and proved before the Ordinary, as touching the goods and chattels bequeathed in the ſame, and enrolled before the Mayor of the ſaid Citie or Borough [g]. Howbeit, it is not always neceſſary that the Teſta-

[a] Dyer fol. 153. verb. deviſe. *Terms of Law*, verb. *Gavel-kind.* & ita ſæpiſſime accepi à nonnullis hujus regni juriſperitis. Tract. de repub. Ang. fol. 107.

[b] Lambert Perambulation of Kent, fol. 23.

[c] *Terms of law*, ubi ſupra. Lambert ubi ſupra, fol. 416.

[d] Fitzherb. Na. Brev. ex gravi querela, in prin. Doct. & Stud. li. 1. c. 7. & 10.

* Brook Abridg. tit. deviſ. n. 22. 51. Fitzh. in d. Br. ex gravi querela. Doct. & Stud. c. c. 7. & 10. Lindw. in c. ſtatut. de teſtam. lib. 3. provincial. conſtit. Cant. verb. de conſuetudine, & verb. laicalis feodi, eod. c.

[f] Fitzher. in d. Brev. ex gravi querela.

[g] Fitzherb. in d. Brev. ex gravi querela.

Teſtament be proved before the Ordinary, or inrolled, wherein Lands onely, and no goods and chattels, are bequeathed [h]. For in ſome places, by the cuſtome there uſed, the Deviſee may enter to the Lands deviſed of his own authority, without any probation or inrollment precedent: and in other places he is to be put in ſeiſin or poſſeſſion by the Bailiff [i]. Neither is it neceſſary that the Will wherein burgage-Land is deviſed ſhould be written according to the form preſcribed in the Statute of *Henry* the eighth †, the ſaid Land being deviſable before the making of that Statute, preſcribing a form of the deviſe of Lands which could not paſs by Will before the making of that Statute, as I have formerly declared *. And it (5) ſeemeth not to be needfull to the validity of the deviſe in this caſe, that the Teſtator ſhould be a Citizen or Burgeſſe of that City or Borough where the Lands or Tenements deviſed do lie; but it is ſufficient, if the Lands and Tenements be holden in Burgage [k]. For that not he onely is ſaid to hold in Burgage who is a Citizen or Burgeſs of the place where the Lands or Tenements be, and holdeth of the King or other Lord Lands or Tenements lying in the City or Borough, yielding therefore to his ſaid Lord a certain yearly rent: but he alſo that is no Citizen or Burgeſs, which holdeth of any Lord Lands or Tenements in Burgage, yielding unto him a certain rent by the year [l]. Which (6) tenure in Burgage is but a kind of tenure in ſoccage [m]. Howbeit there is this difference betwixt Citizens, Burgeſſes and free-men, and thoſe which be not Citizens, Burgeſſes or freemen; that is to ſay, Citizens, Burgeſſes and free-men, may bequeath their Burgage-Lands to Mortmain, which others cannot doe [n]. And (7) in ſome Borough, by the cuſtome thereof, a man may deviſe by his Teſtament, lawfully made, his Lands and Tenements which he hath in fee-ſimple within the ſame Borough at the time of his death; and by force thereof the deviſee, after the death of the Teſtator, may enter into the Tenements to him deviſed, to have and to hold to him after the form and effect of the deviſe, without any livery of ſeiſin thereof to be made unto him [o]. But (8) if there be two joint Tenants in fee-ſimple within one Borough, where the Lands and Tenements within the ſame be deviſable by Teſtament, if one of the ſaid joynt Tenants deviſe that which to him belongeth by Teſtament, and die, this deviſe or legacy is void [p]. The reaſon is, for that no deviſe can take effect till after the death of the Teſtator who did bequeath and deviſe the ſame; but by his death all the Land doth incontinently by the Law of this Realm come to the ſurvivor, who neither claimeth nor hath any thing by deviſe but of his own right by the ſurviver, according to the courſe of the Law of this Land: and for this cauſe ſuch deviſe is void [q].

Another (9) caſe there was alſo ſometimes uſed and practiſed, of deviſing Lands, Tenements and Hereditaments, by Wills to certain uſes, intents and truſts: which Wills or Teſtaments of Lands, Tenements and Hereditaments in Feoffees hands were for the time accompted and taken for good [r].

[h] Brook Abridg. tit. deviſe, n. 43.

[i] Brook d. tit. deviſe, n. 43. principall grounds, tit. burgage, fol. 43.

† H. 8. 32. cap. 1.

* Sup. part. 1. § 11. n. 5.

[k] Brook tit. deviſe, n. 22.

[l] Old tenures, verb. burgage.

[m] Littleton tit. burgage, in princ.

[n] Brook Abridg. tit. cuſtome, n. 7. 38. 41. tit. deviſe, n. 22. 28. Doct. & Stud. lib. 1. c. 10.

[o] Littleton, tit. burgage.

[p] Principall grounds, fol. 20. b.

[q] Principall grounds, fol. 20. b.

[r] Stat. H. 8. an. 27. c. 10.

But

But (10) this cuſtome was reformed in many things, for (11) divers good conſiderations: namely, becauſe by the common Law of this Realm, Lands, Tenements and Hereditaments, be not deviſable by Teſtament; and alſo for that ſuch deviſes were not onely hurtfull to the heir of the Teſtator, being many times thereby diſinherited, but alſo for that divers other inconveniences did by reaſon thereof inſue; as that the Lords loſt their Wards, Marriages, Reliefs, Heriots, Eſcheats, Aids *pur faire fitz chivaler, & pur file marier.* Furthermore, by occaſion of ſuch Wills, and other conveyances to ſecret intents, uſes and truſts, men could not be certainly aſſured of any Lands by them purchaſed, nor knew they againſt whom they ſhould uſe their Actions and Executions for their rights and titles. Beſides this, men Married loſt their Tenancies by the curteſy, women their Dowries; finally, the Prince himſelf loſt the profits of the Lands of perſons attainted. For reformation whereof a Statute was made in the time of King *Henry* the eighth, and enacted as followeth †.

† d. Stat. H. 8. in. 27. c. 10.

That is to ſay, (12) "That where any perſon or perſons ſtand or "be ſeiſed, or at any time hereafter ſhall happen to be ſeiſed, of and in "any Honours, Caſtles, Manors, Lands, Tenements, Rents, Servi- "ces, Reverſions, Remainders, or other Hereditaments, to the uſe, "confidence or truſt of any other perſon or perſons, or of any Body "politick, by reaſon of any bargain, ſale, or feoffment, fine, recove- "ry, covenant, contract, agreement, will, or otherwiſe by any manner "of means whatſoever it be, that in every ſuch caſe, all and every ſuch "perſon and perſons, and Bodies politick, that have or hereafter ſhall "have any ſuch uſe, confidence, or truſt, in fee-ſimple, fee-tail, for "term of life or of years, or otherwiſe, or any uſe, confidence or truſt "in remainder or reverter, ſhall from henceforth ſtand and be ſeiſed, "deemed and adjudged in lawfull ſeiſin, eſtate and poſſeſſion of and "in the ſame Honours, Caſtles, Manors, Lands, Tenements, Rents, "Services, Reverſions, Remainders and Hereditaments, with their "appurtenances, to all intents, conſtructions and purpoſes in the Law, "of and in ſuch like eſtates as they had, or ſhall have, in uſe, truſt or "confidence, of or in the ſame. And that the Eſtate, Title, Right "and Poſſeſſion, that was in ſuch perſon or perſons that were or here- "after ſhall be ſeiſed of any Lands, Tenements or Hereditaments, to "the uſe, confidence or truſt of any ſuch perſon or perſons, or of any Bo- "dy politick, be from henceforth clearly deemed and adjudged to be in "him or them that have, or hereafter ſhall have, ſuch uſe, confidence "or truſt, after ſuch quality, manner, form and condition, as they had "before, in or to the uſe, confidence or truſt, that was in them.

"And be it farther enacted by the Authority aforeſaid, That where "divers and many perſons be or hereafter ſhall happen to be joyntly ſei- "ſed of and in any Lands, Tenements, Rents, Reverſions, Remain- "ders, or other Hereditaments, to the uſe, confidence or truſt of any of "them that be ſo joyntly ſeiſed, that in every ſuch caſe, he or thoſe per- "ſon or perſons which have, or hereafter ſhall have, any ſuch uſes, "confidence or truſt, in any ſuch Lands, Tenements, Rents, Rever-

"ſions, Remainders, or Hereditaments, ſhall from henceforth have, "and be deemed and adjudged to have, onely to him or them that have, "or hereafter ſhall have, ſuch uſe, confidence or truſt, ſuch Eſtate, Poſ- "ſeſſion and Seiſin of and in the ſame Lands, Tenements, Rents, Re- "verſions, Remainders, or other Hereditaments, in like nature, man- "ner, form, condition and courſe, as he or they had before in the uſe, "confidence or truſt of the ſame Lands, Tenements or Hereditaments: "ſaving and reſerving to all and ſingular perſons, and Bodies poli- "tick, their heirs and ſucceſſors, other then him or thoſe perſon or "perſons which be ſeiſed, or hereafter ſhall be ſeiſed, of any Lands, "Tenements or Hereditaments, to any uſe, confidence or truſt, all "ſuch Right, Title, Entry, Intereſt, Poſſeſſion, Rents and Actions, "as they or any of them had, or might have had, before the making of "this Act.

"And alſo ſaving to all and ſingular thoſe perſons, and to their "Heirs, which be or hereafter ſhall be ſeiſed to any uſe, all ſuch for- "mer Right, Title, Entry, Intereſt, Poſſeſſion, Rents, Cuſtomes, "Services, and Actions, as they or any of them might have had to "his or their own proper uſe, in or to any Manors, Lands, Tenements, "Rents or Hereditaments, whereof they be or hereafter ſhall be ſeiſed to "any other uſe, as if this preſent Act had never been had or made; "any thing contained in this Act to the contrary notwithſtan- "ding.

"And where alſo divers perſons ſtand and be ſeiſed of and in any "Lands, Tenements or Hereditaments, in fee-ſimple or otherwiſe, to "the uſe or intent that ſome other perſon or perſons ſhall have and per- "ceive yearly to them, and to his or their Heirs, one annual rent of "ten pounds, or more or leſs, out of the ſame Lands and Tenements; "and ſome other perſon, one other annuall rent to him and his Aſſigns, "for term of life or years, or for ſome other ſpeciall time, according to "ſuch intent and uſe as hath been heretofore declared, limited and made "thereof: Be it therefore enacted by the Authority aforeſaid, That in "every ſuch caſe, the ſame perſons, their Heirs and Aſſigns, that have "ſuch uſe and intereſt, to have and perceive any ſuch annuall rents out "of any Lands, Tenements or Hereditaments, that they and every of "them, their Heirs and Aſſigns, be adjudged and deemed to be in "poſſeſſion and ſeiſin of the ſame rent, of and in ſuch like eſtate, as they "had in the title, intereſt, or uſe of the ſaid rent or profit, and as if a "ſufficient grant or other lawfull conveyance had been made and exe- "cuted to them, by ſuch as were or ſhall be ſeiſed to the uſe or intent "of any ſuch rent, to be had, made, or payed, according to the very "truſt and intent thereof. And that all and every ſuch perſon or per- "ſons as have, or hereafter ſhall have, any title, uſe and intereſt, in "or to any ſuch rent or profit, ſhall lawfully diſtrain for non-payment "of the ſaid rent, and in their own names make advowries, or by their "Bailiffs or Servants make cognizances and juſtifications, and have all "other ſuits, entries, and remedies for ſuch rents, as if the ſame rents "had been actually and really granted to them, with ſufficient clauſes

"of

" of diſtreſſe, re-entry, or otherwiſe, according to ſuch conditions, " pains, or other things, limited and appointed upon the truſt and in- " tent, for payment of ſurety of ſuch rent.

" And be it farther enacted by the Authority aforeſaid, That where- " as divers perſons have purchaſed, or have eſtate made and conveyed " of and in divers Lands, Tenements and Hereditaments, unto them and " to their Wives, and to the Heirs of the Husband, or to the Husband " and to the Wife, and to the Heirs of their two bodies begotten, or " to the Heirs of one of their bodies begotten, or to the Husband and " to the Wife for term of their lives, or for term of life of the ſaid Wife; " or where any ſuch eſtate or purchace of any Lands, Tenements or " Hereditaments, hath been or hereafter ſhall be made to any Husband " and to his Wife, in manner and form above expreſſed, or to any other " perſon or perſons, and to their Heirs and Aſſigns, to the uſe and behoof " of the ſaid Husband and Wife, or to the uſe of the Wife, as is before " rehearſed, for the joynture of the Wife: that then, in every ſuch caſe, " every Woman married, having ſuch joynture made, or hereafter to " be made, ſhall not claim, nor have title to have any Dowry of the re- " ſidue of the Lands, Tenements or Hereditaments, that at any time " were her ſaid Husband's, by whom ſhe hath any ſuch joynture, nor " ſhall demand nor claim her Dowry of and againſt them that have the " Lands and Inheritances of her ſaid Husband. But if ſhe have no " ſuch joynture, then ſhe ſhall be admitted and inabled to purſue, have " and demand her Dowry, by Writ of Dowry, after the due courſe and " order of the Common Laws of this Realm; this Act or any Law or " proviſion made to the contrary thereof notwithſtanding.

" Provided alway, That if any ſuch Woman be lawfully expulſed " or evicted from her ſaid joynture, or from any part thereof, without " any fraud or covin, by lawfull entrie, action, or by diſcontinuance " of her Husband; then every ſuch Woman ſhall be indowed of as much " of the reſidue of her Husband's Tenements or Hereditaments, " whereof ſhe was before dowable, as the ſame Lands and Tenements " ſo evicted and expulſed ſhall amount or extend unto.

" Provided alſo, That this Act, nor any thing therein contained or " expreſſed, extend, or be in any wiſe hurtfull or prejudiciall, to any " Woman or Women heretofore being married, of, for or concerning " ſuch right, title, uſe, intereſt, or poſſeſſion, as they or any of them " have, claim, or pretend to have, for her or their joynture or Dowry, " of, in, or to, any Manors, Lands, Tenements, or other Heredita- " ments, of any of their late Husbands, being now dead or deceaſed; any " thing contained in this Act to the contrary notwithſtanding.

" Provided alſo, That if any Wife have, or hereafter ſhall have, any " Manors, Lands, Tenements or Hereditaments, unto her given or " aſſured after Marriage for term of her life or otherwiſe in joynture, " except the ſame aſſurance be to her made by Act of Parliament, and " the ſaid Wife after that fortune to over-live the ſame her Husband, in " whoſe time the ſaid joynture was made or aſſured unto her; that then " the ſame Wife, ſo over-living, ſhall and may at her liberty, after

"the death of her ſaid Husband, refuſe to have and take the Lands "and Tenements ſo to her given, appointed, or aſſured, during the "coverture, for term of her life or otherwiſe in joynture, except the ſame "aſſurance be to her made by Act of Parliament, as is aforeſaid; and "thereupon to have, ask, demand and take, her Dowry by Writ of "Dowry or otherwiſe, according to the Common Law, of and in all "ſuch Lands, Tenements and Hereditaments, as her Husband was and "ſtood ſeiſed of in any ſtate of Inheritance, at any time during the co-"verture; any thing contained in this Act to the contrary in any wiſe "notwithſtanding.

"Provided alſo, That this preſent Act, or any thing therein contained, "do not extend, or be at any time hereafter interpretated, expounded or "taken, to extinct, releaſe, diſcharge or ſuſpend any ſtatute, recogni-"zance, or other bond, by the execution of any eſtate of or in any "Lands, Tenements or Hereditaments, by the Authority of this Act, to "any perſon or perſons, or Bodies politick; any thing contained in "this Act to the contrary thereof notwithſtanding.

"And foraſmuch as great ambiguities and doubts may ariſe of the "validity and invalidity of Wils heretofore made of any Lands, "Tenements and Hereditaments, to the great trouble of the King's "Subjects; the King's moſt Royall Majeſty, minding the tranquil-"lity and reſt of His loving Subjects, of His moſt excellent and ac-"cuſtomed goodneſſe, is pleaſed and contented, that it be enacted "by the Authority of this preſent Parliament, That all manner true and "juſt Wils and Teſtaments heretofore made by any perſon or perſons "deceaſed, or that ſhall deceaſe before the firſt day of *May*, that ſhall "be in the year of our Lord God 1536. of any Lands, Tenements or "other Hereditaments, ſhall be taken and accepted as good and effectual "in the Law, after ſuch faſhion, manner and form, as they were common-"ly taken and uſed at any time within forty years next afore the making "of this Act; any thing contained in this Act, or in the Preamble there-"of, or any opinion of the Common Law, to the contrary thereof not-"withſtanding.

"Provided alwaies, That the King's Highneſſe ſhall not have, de-"mand or take any advantage or profit, for or by occaſion of the execu-"ting of any eſtate onely by Authority of this Act, to any perſon or per-"ſons, or Bodies politick, which now have, or on this ſide the ſaid "firſt day of *May*, which ſhall be in the year of our Lord God 1536. "ſhall have, any uſe or uſes, truſts or confidences, in any Manors, "Lands, Tenements or Hereditaments, holden of the King's High-"neſſe, by reaſon of primer ſeiſin, livery, *Ouſter le maine*, fine for ali-"enation, relief, or heriot: but that fines for alienations, reliefs and "heriots, ſhall be payed to the King's Highneſs. And alſo Liveries "and *Ouſter le maines* ſhall be ſued for uſes, truſts and confidences to "be made and executed in poſſeſſion, by authority of this Act, after "and from the ſaid firſt day of *May*, of Lands and Tenements and o-"ther Hereditaments holden of the King, in ſuch manner and form, "to all intents, conſtructions and purpoſes, as hath heretofore

"been

"been uſed or accuſtomed by the order of the Laws of this "Realm.

"Provided alſo, That no other perſon or perſons, or Bodies poli-"tick, of whom any Lands, Tenements or Hereditaments, be or "hereafter ſhall be holden, mediate or immediate, ſhall in any wiſe "demand or take any fine, relief, or heriot, for or by occaſion of the "executing of any eſtate by the Authority of this Act, to any perſon or "perſons, or Bodies politick, before the ſaid firſt day of *May*, which "ſhall be in the year of our Lord God 1536.

"And be it enacted by the Authority aforeſaid, That all and ſingular "perſon and perſons, and Bodies politick, which at any time on this "ſide the ſaid firſt day of *May*, which ſhall be in the year of our Lord "God 1536. ſhall have any eſtate unto them executed of and in any "Lands, Tenements or Hereditaments, by the Authority of this Act, "ſhall and may have and take the ſame or like advantage, benefit, vou-"cher, aid-prayer, remedy, commodity and profit, by action, entrie, "condition, or otherwiſe, to all intents, conſtructions and purpoſes, "as the perſon or perſons ſeiſed to their uſe, of or in any ſuch "Lands, Tenements or Hereditaments ſo executed, had, ſhould, "might or ought to have had, at the time of the execution of the eſtate "thereof, by the Authority of this Act, againſt any other perſon or "perſons, of or for any waſt, diſſeiſin, treſpaſſe, condition broken, "or any other offence, cauſe or thing, concerning or touching the "ſaid Lands or Tenements ſo executed by the Authority of this "Act.

"Provided alſo, and be it enacted by the Authority aforeſaid, That "Actions now depending againſt any perſon or perſons, ſeiſed of or in "any Lands, Tenements or Hereditaments, to any uſe, truſt or confidence, "ſhall not abate, ne be diſcharged, for or by reaſon of executing of "any eſtate thereof by Authority of this Act, before the ſaid firſt day "of *May*, which ſhall be in the year of our Lord God 1536. any thing "contained in this Act to the contrary notwithſtanding.

"Provided alſo, That this Act, or any thing therein contained, "ſhall not be prejudiciall to the King's Highneſſe for Wardſhips of "Heirs now being within age, nor for Liveries or for *Ouſter le maines*, "to be ſued by any perſon or perſons now being within age, or of full "age, of any Lands or Tenements unto the ſame Heir or Heirs now "already deſcended; any thing in this Act contained to the contrary "notwithſtanding.

"Provided alſo, and be it enacted by the Authority aforeſaid, That "all and ſingular recogniſances heretofore knowledged, taken or made "to the King's uſe, for or concerning any recoveries of any Lands, Te-"nements or Hereditaments, heretofore uſed or had by Writ or Writs "of Entrie upon diſſeiſin in *Le poſt*, ſhall from henceforth be utterly "void and of none effect to all intents, conſtructions and pur-"poſes.

"Provided alſo, That this Act, nor any thing therein contained, be "in any wiſe prejudiciall or hurtfull to any perſon or perſons born in

"*Wales*, or the Marches of the ſame, which ſhall have any eſtate to "them executed by Authority of this Act in any Lands, Tenements, or "other Hereditaments within this Realm, whereof any other perſon or "perſons now ſtand or be ſeiſed to the uſe of any ſuch perſon or perſons "born in *Wales*, or the Marches of the ſame: but that the ſame per-"ſon or perſons born in *Wales*, or the Marches of the ſame, ſhall or "may lawfully have, retain and keep the ſame Lands, Tenements or "Hereditaments, whereof eſtate ſhall be ſo unto them executed by the "Authority of this Act, according to the tenour of the ſame; any "thing in this Act contained, or any other Act or proviſion heretofore "had or made, to the contrary notwithſtanding.

§ IV.

Certain Caſes wherein by the Statutes of this Realm it is lawfull to deviſe Lands, Tenements, or Hereditaments.

NOW follow certain other caſes authorized by the Statutes of this Realm of *England*, wherein it is lawfull to bequeath or deviſe Lands, Tenements and Hereditaments by Will, ſometimes wholly, and ſometimes in part onely, or ratably, according to the nature of the tenure of ſuch Lands, Tenements and Hereditaments, as in the ſame Statutes, which I have here ſet down at large, doth appear.

An Act declaring how, by the King's grant, Lands, Tenements and Hereditaments may be by Will, Teſtament, or otherwiſe, diſpoſed; and concerning Wards and Primer ſeiſin, &c.

"WHere the King's moſt Royall Majeſty, in all the time of His "moſt Gracious and Noble Reign, hath ever been mercifull, "loving and benevolent, and a moſt Gracious Sovereign Lord, unto "all and ſingular His loving and obedient Subjects, and at many "times paſt hath not onely ſhewed and imparted to them generally, "by His many and often, great and beneficiall Pardons, heretofore "by Authority of His Parliaments granted, but alſo by divers other "waies and means, many great and ample grants and benignities, "in ſuch wiſe, as all His ſaid Subjects have been moſt bounden, "to the utmoſt of all their powers and graces by them received of "God, to render and give unto His Majeſty their moſt humble re-"verence and obedient thanks and ſervices, with their daily and con-"tinuall Prayer to Almighty God, for the continuall preſervation of "His moſt Royall Eſtate in moſt Kingly Honour and Proſperity: yet "alwaies His Majeſty being replete and endowed by God with "grace, goodneſſe and liberality, moſt tenderly conſidering that "His ſaid obedient and loving Subjects cannot uſe or exerciſe them-"ſelves according to their eſtates, degrees, faculties and qualities, or

"bear

" bear themſelves in ſuch wiſe, as that they may conveniently keep and " maintain their Hoſpitalities and Families, nor the good educations " and bringing up of their lawfull generations, which in this Realm, " laud be to God, is in all parts very great and abundant; but that in " manner of neceſſity, as by daily experience is manifeſted and known, " they ſhall not be able of their proper goods, chattels, and other " movable ſubſtance, to diſcharge their debts, and after their de- " grees ſet forth and advance their Children and poſterities: Where- " fore our ſaid Sovereign Lord, moſt vertuouſly conſidering the mor- " tality that is to every perſon, at God's will and pleaſure, moſt com- " mon and uncertain, of His moſt bleſſed diſpoſition and liberality, " being willing to relieve and help His ſaid Subjects in their ſaid " neceſſities and debility, is contented and pleaſed, that it be ordai- " ned and enacted by the Authority of this preſent Parliament in man- " ner and form as hereafter followeth. That is to ſay, That all and " every perſon and perſons, having, or which hereafter ſhall have, any " Manors, Lands, Tenements or Hereditaments, holden in ſocage, " or of the nature of ſocage tenure, and not having any Manors, Lands, " Tenements or Hereditaments, holden of the King our Sovereign " Lord by Knights ſervice, by ſocage tenure in chief, or of the na- " ture of ſocage tenure in chief, nor of any other perſon or perſons " by Knights ſervice, from the 20. day of *July* in the year of our Lord " God 1540. ſhall have full and free liberty, power and authority, to " give, diſpoſe, will and deviſe, as well by his laſt Will and Teſta- " ment in writing, or otherwiſe by any act or acts lawfully executed " in his life, all his ſaid Manors, Lands, Tenements or Hereditaments, " or any of them, at his free will and pleaſure; any Law, Statute, or other " thing heretofore had, made or uſed, to the contrary notwithſtanding.

" And that all and every perſon and perſons having Manors, Lands, " Tenements or Hereditaments, holden of the King our Sovereign " Lord, his Heirs or Succeſſors, in ſocage, or of the nature of ſocage " tenure in chief, and having any other Manors, Lands, Tenements or " Hereditaments, holden of any other perſon or perſons in ſocage, or of " the nature of ſocage tenure, and not having any Manors, Lands, Te- " nements or Hereditaments, holden of the King our Sovereign Lord by " Knights ſervice, nor of any other Lord or perſon by like ſervice, from " the twentieth day of *July* in the ſaid year of our Lord God 1540. ſhall " have full and free liberty, power and authority, to give, will, diſpoſe " and deviſe, as well by his laſt Will or Teſtament in writing, or other- " wiſe by any act or acts lawfully executed in his life, all his ſaid Ma- " nors, Lands, Tenements and Hereditaments, or any of them, at his " free will and pleaſure; any Law, ſtatute, cuſtome, or other thing " heretofore had, made, or uſed, to the contrary notwithſtanding. Sa- " ving alway, and reſerving to the King our Sovereign Lord, His " Heirs and Succeſſors, all His right, title and intereſt of primer ſeiſin, " reliefs, and alſo all other rights and duties for tenures in ſocage, or " of the nature of ſocage tenure in chief, as heretofore hath been uſed " and accuſtomed; the ſame Manors, Lands, Tenements or Hereditа-

" ments,

"ments, to be taken, had and ſued out of and from the hands of His "Highneſſe, His Heirs and Succeſſors, by the perſon or perſons to "whom any ſuch Manors, Lands, Tenements or Hereditaments, ſhall "be diſpoſed, willed or deviſed, in ſuch and like manner and form as "hath been uſed by any Heir or Heirs before the making of this Statute. "And ſaving and reſerving alſo fines for alienations of ſuch Manors, "Lands, Tenements or Hereditaments, holden of the King, our So-"reign Lord, in ſocage, or of the nature of ſocage tenure in chief, "whereof there ſhall be any alteration of free-hold or inheritance made "by Will or otherwiſe, as is aforeſaid.

"And it is farther enacted by the Authority aforeſaid, That all and "ſingular perſon and perſons having any Manors, Lands, Tenements "or Hereditaments, of eſtate of inheritance, holden of the King's "Highneſſe in chief, by Knights ſervice, or of the nature of Knights "ſervice in chief, from the ſaid twentieth day of *July*, ſhall have full "power and authority, by his laſt Will by writing, or otherwiſe by "any act or acts lawfully executed in his life, to give, diſpoſe, will "or aſſign two parts of the ſame Manors, Lands, Tenements or He-"reditaments, in three parts to be divided, or elſe as much of "the ſaid Manors, Lands, Tenements or Hereditaments, as ſhall "extend or amount to the yearly value of two parts of the ſame in three "parts to be divided in certainty and by ſpeciall diviſions, as it "may be known in ſeveralty, to and for the advancement of his "Wife, preferment of his Children, and payment of his debts, "or otherwiſe at his will and pleaſure; any Law, Statute, Cu-"ſtome, or other thing to the contrary thereof notwithſtanding. "Saving and reſerving to the King our Sovereign Lord the cu-"ſtody, Wardſhip, and primer ſeiſin, or any of them, as the caſe "ſhall require, of as much of the ſame Manors, Lands, Tene-"ments or Hereditaments, as ſhall amount and extend to the full "and clear yearly value of the third part thereof, without any di-"minution, dower, fraud, covin, charge, or abridgement of any "of the ſame third part, or of the full profits thereof. Saving alſo "and reſerving to the King our ſaid Sovereign Lord all fines for ali-"enations of all ſuch Manors, Lands, Tenements and Hereditaments, "holden of the King by Knights ſervice in chief, whereof there ſhall be "any alteration of freehold or inheritance made by Will or otherwiſe, "as is aboveſaid.

"And be it enacted by the Authority aforeſaid, That all and ſin-"gular perſon and perſons having Manors, Lands, Tenements or Here-"ditaments of eſtate of inheritance, holden of the King in chief by "Knights ſervice, and having other Manors, Lands, Tenements or "Hereditaments, holden of the King, or of any other perſon or "perſons, by Knights ſervice or otherwiſe, every ſuch perſon "and perſons, from the ſaid twentieth day of *July*, ſhall have "full power and authority to give, diſpoſe, will or aſſign by his "laſt Will in writing, or otherwiſe by any act or acts lawfully execu-"ted in his life, two parts of the ſame Manors, Lands, Tenements or

"Here-

" Hereditaments, in three parts to be divided, or elſe as much of the ſame " Manors, Lands, Tenements and Hereditaments, as ſhall extend or " amount to the yearly value of two parts of the ſame, in three parts to " be divided in certainty and by ſpeciall diviſions, as it may be known " in ſeveralty, to and for the advancement of his Wife, preferment of " his Children, and payment of his debts, or otherwiſe at his will and " pleaſure; any Law, Statute, cuſtome, or other thing to the contra- " ry thereof notwithſtanding. Saving alway and reſerving to the King " our Sovereign Lord the cuſtody, wardſhip, and primer ſeiſin, or any " of them, as the caſe ſhall require, of as much of the ſame Manors, " Lands, Tenements or other Hereditaments, as ſhall amount and " extend to the full and clear yearly value of the third part there- " of, without any manner diminution, dower, fraud, covin, charge, " or ſubtraction of the ſame third part, or of the full profits " thereof.

" Saving alway and reſerving to our ſaid Sovereign Lord the King all " fines for alienation of any ſuch Manors, Lands, Tenements or Here- " ditaments, holden of the King by Knights ſervice in chief, whereof " there ſhall be any alteration of freehold or inheritance, made by will " or otherwiſe, as is above ſaid.

" Be it farther enacted by the Authority aboveſaid, That if any " perſon or perſons hold any Manors, Lands, Tenements or Hereditа- " ments, onely of any other Lord or perſon, then of the King our ſaid " Sovereign Lord by Knights ſervice, and other Lands and Te- " nements in ſocage, or of the nature of ſocage tenure, that then " every ſuch perſon ſhall or may give, diſpoſe, or aſſure, by his laſt " Will, or otherwiſe by any act or acts lawfully executed in his " life, two parts of the ſaid Manors, Lands and Tenements, hol- " den by Knights ſervice, or as much thereof as ſhall amount to the " full yearly value of two parts, in manner and form as is above de- " clared, and alſo all the Lands and Tenements holden by ſocage, or " of the nature of ſocage tenure, at his will and pleaſure, as is above " written. Saving and reſerving to the Lord of the Lands and Tene- " ments holden by Knights ſervice, for his cuſtody and wardſhip, as " much of the ſame Lands and Tenements as ſhall extend or amount " to the full and clear yearly value of the third part of the ſame Lands " and Tenements, holden by Knights ſervice, without any diminuti- " on, dower, fraud, covin, charge, or ſubtraction of any portion of " that third part, or of the clear yearly value thereof, in manner and " form afore ſaid.

" And be it farther enacted by the Authority aboveſaid, That if " any perſon or perſons hold any Manors, Lands, Tenements or Here- " ditaments, onely of the King our Sovereign Lord by Knights ſervice, " and not in chief; or hold any Manors, Lands, Tenements or Here- " ditaments, of our ſaid Sovereign Lord by Knights ſervice, and " not in chief, and alſo hold other Manors, Lands, Tenements and " other Hereditaments, of any other perſon or perſons by Knights " ſervice, and alſo hold other Manors, Lands, Tenements or Heredi-

"taments, of any other perſon or perſons in ſocage, or of the nature "of ſocage tenure; that then all and every ſuch perſon and per- "ſons ſhall and may give, diſpoſe, will, deviſe and aſſure, by his laſt "will, or otherwiſe by any act or acts lawfully done and executed in "his life, two parts of the ſame Manors, Lands, Tenements and He- "reditaments, holden of our ſaid Sovereign Lord the King by Knights "ſervice, and two parts of the Manors, Lands, Tenements and "Hereditaments, holden of any other perſon or perſons by Knights "ſervice, or as much of either of them as ſhall amount to the full "yearly value of two parts, in manner and form as is above decla- "red; and alſo of all his Lands and Tenements ſo holden in ſocage, "or of the nature of ſocage tenure, at his free will and pleaſure. "Saving and reſerving to the King's Highneſſe the cuſtody and "wardſhip of as much of the ſame Manors, Lands, Tenements, "or other Hereditaments, as ſhall extend and amount to the full and "clear yearly value of the third part of the ſaid Manors, Lands, "Tenements and Hereditaments, ſo holden of His Highneſſe by "Knights ſervice, without any diminution, dower, fraud, covin, "charge, and ſubtraction of any portion of that third part, or of "the full profits thereof. And alſo ſaving and reſerving to the "Lords of whom any of the ſaid Manors, Lands, Tenements, or "other Hereditaments, are holden by Knights ſervice, for cuſtody "and wardſhip, as much of the ſame Manors, Lands, Tenements "or Hereditaments, holden of them or any of them by Knights ſer- "vice, as ſhall extend and amount to the full and clear yearly value of "the third part of the ſame, without any diminution, charge, fraud, "covin, or ſubtraction of any portion of that third, or of the clear yearly "value of the third part thereof, in manner and form above de- "clared.

"Provided alway, and it is farther enacted by the Authority afore- "ſaid, That if that third part of the Manors, Lands, Tenements or "Hereditaments, of any of the King's Subjects, which in any of the "caſes aboveſaid ſhall hereafter come to the King's Highneſſe, his "Heirs or Succeſſors, by virtue of this Act, as is above ſaid, be "not or do not amount to the clear yearly value of the third part "of all the ſaid Manors, Lands, Tenements, or other Hereditaments, "whereof the King's Highneſſe is or ſhall be intituled to have the cuſto- "dy or primer ſeiſin, as is above ſaid; that then our ſaid Sovereign Lord "and His Heirs ſhall and may, at His or their free liberty and pleaſure, "take into His or their hands and poſſeſſions, as much of the other two "parts of the ſaid Manors, Lands, Tenements, and other Heredi- "taments, as with that of the ſame Manors, Lands, Tenements or "Hereditaments, holden and remaining in the King's hands, ſhall "make up the clear yearly value of the full third part of the ſaid "Manors and Tenements, ſo to be had to the King's Highneſſe "in title of Wardſhip and primer ſeiſin, or any of them, as "the caſe ſhall require: and like benefit and advantage to be given "to every Lord and Lords, of whom any ſuch Manors, Lands, Tene-

"ments

"ments or Hereditaments, be or ſhall be holden by Knights ſervice, as "is above ſaid, concerning onely his third part of or for title of Ward-"ſhip.

"Provided alway, and be it farther enacted by the Authority afore-"ſaid, That every perſon and perſons ſhall ſue their liveries for poſ-"ſeſſions, reverſions, or remainders, and alſo pay reliefs and heriots, "after ſuch manner and form as they ſhould or ought to have done "before the making of this Act, and as if this Act had never been made. "And that fines for alienations ſhall be paid in the King's Chancery, "for and upon Writs of entrie *in the poſt*, to be obtained in the ſame "Court of Chancery, after the ſaid twentieth day of *July*, for common "recoveries to be had or ſuffered of any Manors, Lands, Tenements "or Hereditaments, holden of the King in chief, in like manner and "form as is uſed upon alienations of ſuch Manors, Lands, Tenements "or Hereditaments, ſo holden in chief, by fine or feoffment.

"Provided alſo, and be it enacted by the Authority aforeſaid, That "in ſuch caſes, where fines for alienations ſhall be payed in the King's "Chancery for Writs of entrie *in the poſt*, as is afore ſaid, that then none "other fine ſhall be payed in the ſame Court for any ſuch Writs; any "uſage or cuſtome to the contrary thereof notwithſtanding.

"And be it farther enacted by the Authority aforeſaid, That where "two or more perſons now hold, or hereafter ſhall hold, any Manors, "Lands, Tenements or Hereditaments, of the King our Sovereign "Lord by Knights ſervice, joyntly to them and to the Heirs of one "of them, and he that hath the Inheritance thereof dieth, his Heir be-"ing within age, that in every ſuch caſe the King ſhall have the Ward "and marriage of the body of ſuch Heir ſo being within age; the life "of the free-holder or free-holders of the ſaid Manors, Lands, Tene-"ments or Hereditaments, ſo holden by Knights ſervice, notwithſtan-"ding. Saving and reſerving to all and every woman and women "all and every ſuch right, title, and intereſt of Dower, as they or any "of them ought to have, or be or ſhall be juſtly intituled to have, claim, "or demand, of any Manors, Lands, Tenements or Heredita-"ments, by the Laws of this Realm, to be taken or aſſigned unto them, "or any of them, out of the two parts of the ſaid Manors, Lands, Te-"nements or Hereditaments, ſevered and divided from the third part, "at is above ſaid, and not otherwiſe. And ſaving alſo to the King our "Sovereign Lord, His Heirs and ſucceſſors, the reverſions of all ſuch "Tenants in joynt-tenure and Dower, immediately after the death of "ſuch Tenants, if they ſhall happen to die during the minority of the "King's Wards.

Another Act for the Explanation of the former, concerning Wills, and the deviſe of Lands.

"WHereas in the laſt Parliament, begun and holden at *Weſt-*
"*minſter*, the 28. day of *April*, in the 31. year of the King's
"moſt gracious reign, (*cap. primo* Wills 2.) and there by divers pro-
"rogations holden and continued unto the four and twentieth day of
"*July*, in the two and thirtieth year of His ſaid reign, it was by the
"King's moſt gracious and liberall diſpoſition, ſhewed toward His
"moſt humble and obedient ſubjects, ordained and enacted how and
"in what manner Lands, Tenements and Hereditaments, might by
"Will, or Teſtament in writing, or otherwiſe by any act or acts
"lawfully executed in the life of every perſon, be given, diſpo-
"ſed, willed or deviſed, for the advancement of the Wife, prefer-
"ment of Children, payment of debts, of every ſuch perſon, or o-
"therwiſe, at his will or pleaſure, as in the ſame Act more plainly is
"declared: Sithen the making of the Eſtatute, divers doubts, queſtions
"and ambiguities have riſen, been moved and grown, by diverſity of
"opinions taking in and upon the expoſition of the letter of the ſame
"Eſtatute.

"For a plain declaration and explanation whereof, and to the in-
"tent and purpoſe that the King's obedient and loving ſubjects ſhall
"and may take the commodity and advantage of the King's ſaid gra-
"cious and liberall diſpoſition, the Lords Spirituall and Temporall
"and the Commons in this preſent Parliament aſſembled moſt humbly
"beſeech the King's Majeſty, that the meaning of the letter of the
"ſame Eſtatute, concerning ſuch matters hereafter rehearſed, may be
"by the Authority of this preſent Parliament enacted, taken, ex-
"pounded, judged, declared and explained, in manner and form
"following.

"Firſt, where it is contained in the ſame former Statute, within
"divers Articles and branches of the ſame, that all and ſingular per-
"ſon and perſons having any Manors, Lands, Tenements or Here-
"ditaments, of the eſtate of Inheritance, ſhould have full and free
"liberty, power and authority, to give, will, diſpoſe, or aſſign, as
"well by laſt Will and Teſtament in writing, or otherwiſe by any
"act or acts lawfully executed in his life, his Manors, Lands, Te-
"nements or Hereditaments, or any of them, in ſuch manner and
"form as in the ſame former Act more at large it doth appear.
"Which words of eſtate of Inheritance, by the Authority of this pre-
"ſent Parliament, is and ſhall be declared, expounded, taken and
"judged, of eſtates in fee-ſimple onely. And alſo that all and ſin-
"gular perſon and perſons having a ſole eſtate or intereſt in fee-ſim-
"ple, or ſeiſed in fee-ſimple in copercenary, or in common in fee-
"ſimple, of and in any Manors, Lands, Tenements, Rents, or o-

"ther

"ther Hereditaments, in poſſeſſion, reverſion or remainder, or of rents "or ſervices incident to any reverſion or remainder, and having no "Manors, Lands, Tenements or Hereditaments holden of the King, "His Heirs or Succeſſours, or of any other perſon or perſons, by "Knights ſervice, ſhall have full and free liberty, power and autho- "rity, to give, diſpoſe, will or deviſe to any perſon or perſons (ex- "cept Bodies politick and corporate) by his laſt Will and Teſtament "in writing, or otherwiſe by any act or acts lawfully executed in "his life, by himſelf ſolely, or by himſelf and other joyntly, ſeve- "rally, or particularly, or by all thoſe ways or any of them, as "much as in him of right is or ſhall be, all his ſaid Manors, Lands, "Tenements, Rents and Hereditaments, or any of them, or any Rents, "Commons, or other profits or commodities, out of, or to be per- "ceived of the ſame, or out of any parcell thereof, at his own free will "and pleaſure, any clauſe in the ſaid former Act notwithſtanding.

"And farther be it declared and enacted by the Authority aforeſaid, "That all and ſingular perſon and perſons having a ſole eſtate or inte- "reſt in fee-ſimple, or ſeiſed in fee-ſimple in copercenary, or in common "in fee-ſimple, of or in any Manors, Lands, Tenements, Rents, or "other Hereditaments, in Poſſeſſion, Reverſion or Remainder, or of "and in any Rents or Services incident to any reverſion or remainder, "holden of the King by Knights ſervice in chief, or of the nature of "Knights ſervice in chief, hath, and by the Authority of this preſent "Parliament ſhall have, full and free liberty, power and authority, "to give, diſpoſe, will or aſſign to any perſon or perſons (except "Bodies politick and corporate) by his laſt Will and Teſtament in "writing, or otherwiſe by any act or acts lawfully executed in his "life, by himſelf ſolely, or by himſelf and other joyntly, ſeverally, "or particularly, or by all thoſe waies or any of them, as much as in "him of right is or ſhall be, two parts, as well of all the ſaid Manors, "Lands, Tenements, Rents and Hereditaments, as of all and ſingu- "lar his other Rents and Hereditaments, or of any of them, or any "rents, commons, or other profits or commodities, out of, or to be "perceived of the ſame two parts, or out of any parcell thereof, in "three parts to be divided, or as much thereof as ſhall amount to the "full and clear yearly value of two parts thereof, in three parts to be "divided, of what perſon or perſons ſoever they be holden, at his free "will and pleaſure. And that by the Authority aforeſaid, the ſaid "Will ſo declared ſhall be good and effectuall for two parts of the "ſaid Manors, Lands, Tenements and Hereditaments, although the "Will ſo declared be made of the whole, or of more then of two parts "of the ſame. The ſame diviſion to be made and ſet forth by "the Deviſor or Owner of the ſame Manors, Lands, Tenements "and Hereditaments, by his laſt Will in writing, or otherwiſe in "writing. And in default thereof, by a Commiſſion to be granted "out of the King's Court of the Wards and Liveries, upon the enqui- "ry of the true value thereof by the Oaths of twelve men, and return or "certificate thereof had in the ſame Court, of the ſaid Manors, Lands,

"Tenements and Hereditaments, diviſion to be made by the Maſter "of the Wards and Liveries, if the Maſter of the Wards and Liveries "for the time being, and the parties thereunto, cannot otherwiſe "agree upon the ſame diviſion. And that the iſſues and profits of "the two parts of the ſame Manors, Lands, Tenements and Heredi- "taments, upon every ſuch diviſion, ſhall be reſtored to them that ſhall "have right or Title to the ſame, from the death of the Owner or "Deviſor thereof.

"And farther be it enacted and declared by the Authority aforeſaid, "That all and ſingular perſon and perſons having a ſole eſtate or inte- "reſt in fee-ſimple, or ſeiſed in fee-ſimple in copercenary, or in com- "mon in fee-ſimple, of and in any Manors, Lands, Tenements, Rents, "or other Hereditaments, in poſſeſſion, reverſion, or remainder, "or of and in any Rents or Services incident to any reverſion or re- "mainder, holden of the King, His Heirs or Succeſſours, by Knights "ſervice, and not in chief, or holden of any other perſon or per- "ſons by Knights ſervice, ſhall have full and free liberty, power "and authority, to give, diſpoſe, will or deviſe, to any perſon or "perſons, except Bodies politick and corporate, by his laſt Will and "Teſtament in writing, or otherwiſe by any act or acts lawfully exe- "cuted in his life, by himſelf ſolely, or by himſelf and other joyntly, "ſeverally, or particularly, or by all thoſe waies, or any of them, as "much as in him of right is or ſhall be, two parts of all the ſaid Ma- "nors, Lands, Tenements and Hereditaments, or any of them, ſo hol- "den by Knights ſervice, or any Rents, common, or other profits or com- "modities, out of, or to be perceived of the ſame two parts, or out of "any parcell thereof, in three parts to be divided, or as much thereof "as ſhall amount to the full and clear yearly value of two parts thereof, "in three parts to be divided, at his free will and pleaſure. And "that the ſaid Will, ſo declared by Authority aforeſaid, ſhall be good "and effectuall for two parts of the ſaid Manors, Lands, Tenements "or Hereditaments, although the Will ſo declared be or ſhall be made "of the whole Lands and Tenements ſo holden by Knights ſervice, or "of more then of two parts of the ſame; and alſo for the whole of all "other ſuch Manors, Lands, Tenements and Hereditaments, or any "of them, not holden of the King by Knights ſervice in chief, or o- "therwiſe by Knights ſervice, nor of any other perſon by Knights ſer- "vice, and of any Rents, commons, or other profits or commodi- "ties, out of, or to be perceived of the ſame, or out of any parcell "thereof, at his free will and pleaſure. The ſame diviſion to be "made and ſet forth by the Owner of the ſaid Manors, Lands, Te- "nements and Hereditaments, by his laſt Will and Teſtament in "writing, or otherwiſe in writing. And in default thereof, for as "much of the ſame Manors, Lands, Tenements and Hereditaments, "as ſhall concern the King's intereſt, by commiſſion to be directed "out of the King's Court of the Wards and Liveries, in manner and "form as is afore ſaid, if the Maſter of the Wards and Liveries for "the time being, and the parties thereunto, cannot otherwiſe agree

"upon

"upon the ſame diviſion. And that reſtitution of the iſſues and pro-
"fits of the two parts thereof ſhall be had and made in manner and
"form above ſaid. And for ſuch of the ſame Manors, Lands, Tene-
"ments and Hereditaments, as ſhall concern the intereſt of any other
"Lord or Lords, by Commiſſion to be granted out of the King's Court
"of Chancery, to enquire thereof by the Oaths of twelve men, if the
"ſame Lord or Lords, and the parties thereunto, cannot otherwiſe
"agree upon the ſame diviſion.

"And be it farther enacted and declared by the Authority aforeſaid,
"That the ſavings, reſervings and proviſions, concerning ſaving of
"the cuſtody, wardſhip, relief and primer ſeiſin to the King, of ſuch
"Manors, Lands, Tenements and Hereditaments, or as much thereof
"as ſhall appertain unto Him by virtue of the ſaid former Act, and by
"the declaration and expoſition thereof, declared by this preſent Act,
"during the King's intereſt therein, and alſo of the cuſtody and ward-
"ſhip to other Lords, of as much of ſuch Manors, Lands, Tenements
"and Hereditaments holden of them, as ſhall amount and extend to
"the clear yearly value of the third part thereof, over and above all
"charges, without any diminution or abridgment of the third part,
"or of the full profits thereof, compriſed and mentioned in divers
"Articles in the ſaid former Act contained, by the Authority afore-
"ſaid, be, and ſhall be, intended, expounded, and taken, as hereaf-
"ter-inſueth: that is to ſay, That the King ſhall have and take for His
"full third part of all ſuch Manors, Lands, Tenements and Heredita-
"ments, whereunto He is or ſhall be intituled by the ſaid former Act,
"and by this preſent Act, ſuch Manors, Lands and Tenements, as ſhall
"by any means diſcend, or come by diſcent, as well of the eſtate of
"Inheritance in fee-tail, as in fee-ſimple, or in fee-tail onely, to the
"Heir of any ſuch perſon, or that ſhall make any will, gift, diſpoſi-
"tion or deviſe by his laſt Will in writing, or by any act or acts law-
"fully executed in his life, immediately after the death of the ſame De-
"viſor or Owner thereof. And that the Will, gift and deviſe, of eve-
"ry ſuch Deviſor or Owner, of and for the two parts of the ſaid Ma-
"nors, Lands, Tenements and Hereditaments reſidue, ſhall, by the
"Authority aforeſaid, be and ſtand good and effectuall in the Law, al-
"beit the ſame will, gift or deviſe, be had and made of all his fee-ſim-
"ple Lands, Tenements and Hereditaments. And in caſe the ſame
"Manors, Lands, Tenements and Hereditaments, after the death
"of any ſuch Owner or Deviſor, which ſhall make any ſuch gift, diſ-
"poſition or deviſe, by his laſt Will in writing, or otherwiſe by any
"act or acts lawfully executed in his life, to his Wife, Children, or
"otherwiſe, as is aforeſaid, which ſhall immediately after his death diſ-
"cend, revert, remain or come to his Heir or Heirs, as well of eſtate
"of Inheritance in fee-tail, as of eſtate in fee-ſimple, or fee-tail onely,
"be not, or ſhall not amount or extend to the full clear yearly value of
"the full third part, with the full profits thereof, of all the ſaid
"Manors, Lands, Tenements, or other Hereditaments of the ſaid
"Deviſor or Owner, according to the true intent and meaning of

"the

"the ſaid former Act, and of this preſent Act; That then the King "ſhall and may have and take into His hands and poſſeſſion, to make "up His full third part, with the full profits thereof, according to "His intereſt therein, as much of the other Manors, Lands, Tenements "or Hereditaments, willed, given, diſpoſed or aſſigned by any ſuch "perſon to his Wife, Children, or otherwiſe, as is afore ſaid, as with "ſuch of the ſaid Manors, Lands, Tenements and Hereditaments, de-"ſcended, or by any means come unto the Heir, as Heir of any ſuch "Deviſor or Owner, ſhall make up the clear yearly value of the "ſaid full third part, with the full profits thereof, of all the ſaid Ma-"nors, Lands, Tenements and Hereditaments, of every ſuch Owner "or Deviſor, ſo to be had to the King, in the Title of Wardſhip or "primer ſeiſin, as the caſe ſhall require. And the diviſion thereof "to be had and made, and with the reſtitution of the profits of the "two parts of the ſaid Manors, Lands, Tenements and Hereditа-"ments, in ſuch manner and form as is above rehearſed. And like "benefit and advantage to be given, had, and taken, by the ſaid Au-"thority, to every Lord and Lords, of whom any ſuch Manors, "Lands, Tenements or Hereditaments, been or ſhall be holden by "Knights ſervice, in manner and form as is above ſaid, concerning "onely his or their third parts thereof, according to their ſaid intereſt "therein.

"And be it farther enacted by the Authority aforeſaid, That if it "happen the ſame third part, or any part thereof, left, willed or aſ-"ſigned, to the King or other Lord, at any time during their intereſts "therein, to be lawfully evicted or determined, that then the King "and the other Lord ſhall have as much of the two parts reſidue, as "ſhall accompliſh and make up a full third part in clear yearly value, "after the rate and portion of ſuch Manors, Lands, Tenements and "Hereditaments, as ſhall then happen to remain of the ſame third part "not evicted nor determined, and of the other two parts of ſuch Ma-"nors, Lands, Tenements and Hereditaments, as the King or other "Lord ſhould or ought to have had, by virtue of the ſaid former Act, "and this preſent Act: and the ſame to be divided in manner and "form above rehearſed, any clauſe in the ſaid former Act notwithſtan-"ding.

"And be it farther enacted and declared by the Authority aforeſaid, "That the ſaving and reſerving for fines for alienation by any ſuch "laſt Will and Teſtament, of ſuch Manors, Lands, Tenements or He-"reditaments, holden of the King by Knights ſervice in chief, or of the "nature of Knights ſervice in chief, or by ſocage in chief, or of the "nature of ſocage tenure in chief, or for fines for alienation of ſuch "Manors, Lands, Tenements or Hereditaments, whereof there ſhall "be any alteration of free-hold or of Inheritance, made by any ſuch "laſt Will, compriſed in divers and ſundry Articles mentioned in "the ſaid former Act, be and ſhall be intended, expounded, taken, "deemed and judged, by the Authority aforeſaid; that all ſuch perſon "or perſons to whom the ſaid Manors, Lands, Tenements or Heredi-

"taments,

" taments, or any of them, be or ſhall be given, diſpoſed, willed or " deviſed, by any ſuch laſt Will, ſhall be exonerated, acquitted and " diſcharged for ever, againſt the King, His Heirs and Succeſſours, for " all ſuch fines for alienations, by any ſuch laſt Will or Teſtament, " without licence, by ſuing forth of the King's pardon for alienation " out of the King's Court of Chancery, paying to the King, His Heirs " or Succeſſours, for the fine of every ſuch alienation, the third part of " the yearly value of the ſame Manors, Lands, Tenements, or other " Hereditaments, to him or them willed or deviſed. And this Act " from time to time ſhall be a ſufficient warrant to the Lord Chancel- " lour of *England*, or Keeper of the great Seal, for the time being, for " the granting out of the ſaid pardon or pardons under the King's great " Seal, as heretofore hath been uſed for pardons for alienations, with- " out any farther ſute to be made to the King for the ſame.

" And it is farther declared and enacted by the Authority aforeſaid, " That Wills or Teſtaments made of any Manors, Lands, Tenements, " or other Hereditaments, by any woman covert, or perſon within the " age of 21 years, Idiote, or by any perſon *de non ſane memorie*, ſhall " not be taken to be good or effectuall in the Law.

" And farther be it enacted by the Authority aforeſaid, That if any " perſon or perſons, having an eſtate of inheritance of or in Manors, " Lands, Tenements or Hereditaments, holden of the King by Knights " ſervice in chief, or otherwiſe of the King by Knights ſervice, or of " any other perſon or perſons by Knights ſervice, hath given at any " time ſithence the twentieth day of the ſaid moneth of *July* 32 *Hen.* " 8. *Anno Dom.* 1540. or hereafter ſhall give, will, deviſe or aſſign, by " will or other act executed in his life, his Manors, Lands, Tenements " or Hereditaments, or any of them, by fraud or covin, to any other " perſon or perſons, for term of years, life, or lives, with one remain- " der over in fee, or with divers remainders over for term of years, life, " or in tail, with a remainder over in fee-ſimple, to any perſon or per- " ſons, or to his or their right Heirs, or at any time ſithence the ſaid " 20. day of *July* hath conveied or made, or hereafter ſhall convey " or make, by fraud or covin, contrary to the true intent of this Act, " any eſtates, conditions, menalties, tenures, or conveyances, to the " intent to defraud or deceive the King of his prerogative, primer ſeiſin, " livery, relief, wardſhip, marriages, or rights, or any other Lord of " their wardſhips, reliefs, heriots, or other profits, which ſhould or " ought to accrue, grow, or come unto them, or any of them, by or " after the death of his or their Tenant, by force of and according to the " former Statute, and of this preſent Act and declaration; the ſame " eſtates and other conveyances being found by office to be ſo made or " contrived by covin, fraud or deceit, as is aboveſaid, contrary to the " true intent and meaning of the ſaid former Act, and of this Act; " That then the King ſhall have as well the Wardſhip of the body, " and cuſtody of the Lands, Tenements and Hereditaments, as livery, " primer ſeiſin, relief, and other profits, which ſhould or ought to ap- " pertain to the King, according to the true intent and meaning of the

" ſaid former Act, and of this preſent Act, as though no ſuch eſtates " or conveyances by covin had ever been had or made, untill the ſaid " office be lawfully undone by travers or otherwiſe. And that the o- " ther Lord and Lords of whom any ſuch Manors, Lands, Tenements " or Hereditaments, ſhall be holden by Knights ſervice, as is aforeſaid, " ſhall have their remedy in ſuch caſes, for his or their Wardſhips of " bodies and lands, by writ of right of Ward, and ſhall diſtrain and " make avowrie or recogniſance, by themſelves or their Bailiffs, for " their reliefs, heriots, and other profits, which ſhould have been to " them due by or after the death of their Tenant, as if no ſuch eſtate or " conveyance had been had or made. Saving and reſerving always, " by the Authority aforeſaid, the right and title of the Donees, Feoffees, " Leſſees and Deviſees thereof, againſt the ſaid Deviſor and his Heirs, " after the intereſt and Title of the King, or other Lord, therein ended " and determined.

" Provided always, That this Act, explanation and declaration, or " any of them, or any thing in this ſaid Act, explanation or declarati- " on contained, ſhall not extend to the Will or deviſe of Sir *John* " *Gaynsford*, late of *Crowherſt* in the County of *Surry*, Knight, deceaſed; " nor to the Will or deviſe of Sir *Peter Filpot*, Knight, deceaſed; nor to " the Will or deviſe of *Richard Creſwell*, late of *Mattingley* in the " County of *South*. Gentleman, deceaſed; nor to the Will or deviſe of " *Thomas Unton*, late of the County of *Berk*. Gentleman, deceaſed, Son " of Sir *Thomas Unton*, Knight, alſo deceaſed; nor ſhall be in any " wiſe prejudiciall or hurtfull to any perſon or perſons for or concer- " ning any Manors and Lands, Tenements or Hereditaments, contai- " ned or ſpecified in the ſaid wills or deviſes, or in any of them: but " that the ſaid laſt wills and deviſes, and every of them, ſhall ſtand, " abide, remain and be in the ſame caſe, force and effect in the Law, " to all intents, purpoſes and conſtructions, as the ſaid laſt wills and " deviſes, and every of them, were before the making of this Act, de- " claration and explanation, and of none other effect or force: this " Act, declaration and explanation, or any of them, or any thing " therein contained, to the contrary thereof in any wiſe notwithſtan- " ding.

" Provided always, and be it enacted by the Authority aforeſaid, " That all and every perſon and perſons from whom the King, and " other Lord or Lords, ſhall take any Manors, Lands, Tenements, or " Hereditaments, for his or their full third part, or to make up his or " their third part, ſhall and may, by Authority of this preſent Act, in " any of the caſes aforeſaid, upon his or their bill exhibited in the King's " Court of Chancery, againſt all and every ſuch perſon and perſons " which ſhall be intitled by or under any ſuch Will, gift, diſpoſition or " deviſe, to the other two parts, have ſuch contribution or recompence " for the ſame, as by the Chancellour of *England*, or by the Keeper of " the great Seal of *England*, for the time being, ſhall be thought good " and convenient.

What

What ſhall be a good deviſe of lands and tenements; what not: what eſtate ſhall paſs by the words of the will, whether fee-ſimple, fee-tail, for life, or other eſtate.

A Man ſeiſed of a Manor, parcel in demeſne, and parcel in ſervice, deviſeth by his Teſtament to his wife, during her life, all the demeſne lands; and alſo by the ſame Teſtament he deviſeth to her all his ſervices and chief rents for 15 years; and farther by the ſame Teſtament he deviſeth all his Manor to another after the death of his wife. It was agreed by all the Juſtices, that the deviſe doth not take effect for any part of the Manor, till after the death of the wife; and that the heir after the 15 years paſt, and during the life of the wife, ſhall have the ſervices and chief rents [a].

A. deviſeth lands to B. and the heirs males of his body, and if he dieth without heirs of his body, the remainder to C. and his heirs: adjudged that B. had not an eſtate tail general, but to the heirs males of his body [b].

A. deviſeth his lands to his wife *de anno in annum* until his ſon cometh to the age of 20 years, and dieth; the wife enters, and the ſon dieth before he attains to his age of 20 years: the intereſt of the wife is determined, by reaſon of thoſe words, *de anno in annum:* but if the deviſe had been to the wife until his ſon cometh to the age of 20 years, then notwithſtanding the death of the ſon the intereſt of the wife doth continue [c].

A. maketh his will in this manner, *Item* I give my Manor of *Dale* to my ſecond ſon; *Item* I give my Manor of *Sale* to my ſaid ſon and his heirs: *per Dyer, Weſton,* and *Welſh,* the Son had but an eſtate for life in the Manor of *Dale*; and the word (*Item*) ſeemeth to be a new gift, and a greater preferment in the ſecond place, for the amends of the other. But *Brown* was of the opinion, that (*Item*) is as a Copulative, and the heirs expreſſed in the laſt clauſe extend to both *D.* and *S.* *Dyer* ſaid, that if in the firſt clauſe there had not been any perſon named, but the words had been, *Item* I give the Manor of *D. Item* I give the Manor of *S.* to my ſaid ſon and his heirs, that it ſhould refer to both Manors [d].

A man ſeiſed of lands deviſeth them by his Teſtament to his wife, to diſpoſe and imploy them for her and her Son, at her will and pleaſure: adjudged that the wife had a fee-ſimple in the lands; but the eſtate in her is but conditional, becauſe theſe words (*ea intentione*) make a Condition in every deviſe, and the words in the deviſe do amount unto ſo much, ſo that ſhe cannot give or aſſign them over to a ſtranger, but muſt hold them her ſelf, or give them to her ſon *.

B. deviſeth his lands to A. and if A dieth before he hath any iſſue of his body, then he deviſeth his lands to C. and his heirs: adjudged that A. hath an eſtate-tail by implication, as well by the words [if he

[a] T. 3 E. 6. Moors rep. fo. 7. n. 24. P. 25 Eliz. Moors rep. fo. 123. n. 269.

[b] P. 4 & 5 Philip. & Mar. rot. 922. C. B. *Tuck* verſ. *Frencham.* Moors rep. fol. 13. n. 50. fol. 124. n. 269. Dyer fol. 171. 115.

[c] P. 5 Eliz. Moors rep. fo. 48. n. 143.

[d] P. 5 Eliz. Moors rep. fo. 52. n. 153.

* P. 6 Eliz. Moors rep. fol. 57. n. 162. Vid. H. 22 Jac. rot. 720. B. R. *Daniel* verſ. *Ubley.* Jones rep. fo. 137. Dy. 126. Coke lib. 6. fo. 16.

he die before he hath iſſue,] as by the words, [if he die without iſſue [f].]

[f] P. 25 Eliz. rot. 851. C. B. *Newton* verſ. *Barnardine.*

Deviſe to one for life, and after his deceaſe to the men-children of his body; it's an entail in the father to his heirs males. So a deviſe to one and the children of his body, is an entail [g].

[g] 4 Eliz. Bendloes rep. H. 37 Eliz. rot. 1030. *Richardſon* verſ. *Yardley.* Moors rep. fo. 397. n. 519.

If a man deviſe the uſe, profits, or occupation of his land, by this deviſe the land it ſelf is deviſed. C. lib. 8. 94. Pl. C. 525. Brownl. 80. part 1. For lands will paſs by words in a Will, which will not paſs by the ſame words in a deed. But whatſoever will paſs by any words in a deed, will paſs by the ſame words in a will: for wills are always more favourably expounded then deeds. Pl. Com. fo. 66 [h].

[h] C. lib. 8. 94. Pl. Com. fo. 525. Brownl. fo. 80. part 1. Pl. Com. fo. 66.

If a man be ſeiſed of land in Fee-ſimple in the pariſh of D. and by his will deviſeth all his lands in the ſaid pariſh to A. B. and after the will made and publiſhed, he doth purchaſe other lands in the ſaid pariſh, and dieth; A. B. ſhall not have the new purchaſed lands. Pl. Com. fo. 343, 344. Old N. B. 89. Fitz. deviſe 17. Yet by a new publication of the will after the purchaſing of ſuch lands, they will paſs to A. B [i].

[i] T. 37 Eliz. B. R. *Breckford* verſ. *Parnicote.*

Three brothers of one father and mother, the middle brother ſeiſed of land deviſable giveth it by his Teſtament *propinquiori fratri ſuo*; the deviſe is void [k].

[k] Dyers Reading upon this Stat.

If a man in one part of his will deviſeth his lands to A. in Fee, and afterwards by another clauſe in the ſame will deviſeth the ſame lands to another in Fee, they are joyntenants [l].

[l] M. 8 Eliz. in C. B. Leonard 3. part, f. 11.

A. hath iſſue 2 ſons both named *John*, and conceiving his eldeſt ſon to be dead, he deviſeth his lands by his will to his ſon *John* generally, when in truth the eldeſt ſon is living: in this caſe, the younger ſon may alledge and give in evidence the deviſe to him, and may produce witneſs to prove the intent of the father; and if no proof can be made, the deviſe ſhall be void for the incertainty [m].

[m] M. 34 Eliz. Sen'or *Cheneys* caſe. lib. 5. fo. 67.

One deviſed his lands in D. in tail, the remainder to the next of the Kin of his name; at the time of the deviſe the next of his Kin was his brother's daughter, who was then married to J. S. the deviſor died, the tenant in tail afterwards died without iſſue: adjudged that the daughter ſhould not take; becauſe ſhe is not now of the name of the deviſor, but of the husband's name; but if ſhe had been unmarried at the time of the deviſe and death of the donor, although ſhe had been married at the time of the death of tenant in tail without iſſue, yet ſhe ſhould have had the land [n].

[n] T. 39 Eliz. C. B. *Jones* Caſe. Crok. part 3 fo. 64. Crok. part 3. fo. 532. M. 30 Eliz. B. R. *Bon* verſ. *Smyth.*

A. deviſeth his houſe with the appurtenances *in Ejectione firmæ:* it was a queſtion, whether land in the field thereby paſſed. *Popham* doubted, but *Fenner* ſaid it might paſs, and that upon demur. in 28 Eliz. it was adjudged accordingly. But upon evidence it did appear that the houſe was Copyhold, and the land free-hold: the whole Court thereupon conceived, that it could not be ſaid appurtenant, although it had been uſed with it [o].

[o] M. 41 Eliz. B. R. *Yates* verſ. *Clinkard.* Croke part 3. fo.

A man by his will releaſeth all his lands, &c. to A. and his heirs: adjudged it was a good deviſe of the lands to A. and his heirs [p].

[p] M. 37. Eliz. *Anderſons* Caſe. 83.

One deviſeth his land to his ſon and heir after the death of his wife:

wife: it's a good deviſe (by implication) to the wife for her life; for it appeareth he intended his heir ſhould not have it untill the death of his wife; and none can have it beſides the wife. But if ſuch a deviſe had been made to a ſtranger after the death of his wife, it would have deſcended unto the heir [q].

A. ſeiſed of the Manor of *Cheſſam* extending into *Cheſſam* and the town of *Hertford*, and alſo of lands in *Hertford*, deviſed by will the Manor of *Cheſſam* to B. his eldeſt ſon in tail, and the lands in *Hertford* to C. his youngeſt ſon: it was held by all the Juſtices, that the youngeſt ſon ſhould have all that part of the Manor of *Cheſſam* which lay in the town of *Hertford* [r].

A. deviſed that his land ſhould deſcend to his ſon, but willed that his wife ſhould take the profits thereof untill the full age of the ſon, for his education and bringing up, and died; the wife married another husband, and died before the full age of the ſon: the husband ſhall not have the profits of the lands till the full age of the ſon; for nothing is deviſed to the wife but a confidence, and ſhe is a guardian or bailif for the infant, which by her death is determined, and the ſame confidence cannot be transferred to the husband [†].

A. deviſeth his lands to B. after the deceaſe of his wife, and if he fail, then he willeth all his part to the diſcretion of his father, and died; B. ſurvived, the father being dead before without any diſpoſition of the land. In this caſe the father had a fee-ſimple, there being no difference where the deviſe is, that J. S. ſhall doe with the land at his pleaſure, and the deviſe thereof to J. S. to doe with it at his diſcretion [t].

A man deviſeth lands to another man and his heirs, the deviſee died in the life of the deviſor, and then the deviſor died: in this caſe the heirs of the deviſee ſhall not take by the deviſe, for that the heirs are not named as words of purchace, but onely to expreſs and limit the eſtate which the deviſee ſhould have; for without the word (*heirs*) the deviſee could not have the fee-ſimple [v].

A man ſeiſed of lands made his will in this manner. Firſt I bequeath to my wife *Black-acre*, for the term of her life, the remainder to my ſon T. in tail; *Item*, I will to my ſon T. all my lands in *D.* alſo my lands in *S.* and alſo my lands in *V.* Alſo I give to my ſon T. all my Iſland of land, or incloſed land with water, which I purchaſed of J. S. to have and to hold all the ſaid laſt before deviſed premiſſes to the ſaid T. my ſon and the heirs of his body. The queſtion was, if the *Habendum* ſhould extend to the Iſland onely; if ſo, then T. ſhall have but for life the lands in *D. S.* and *V.* But it was reſolved by all the Juſtices, that the thing laſt deviſed by the will was an Iſland in the ſingular number, which cannot ſatisfie the *Habendum*, which is in the plural number; and therefore to verifie the plural number, the *Habendum* by fit conſtruction ſhall extend to all the lands in *D. S. V.* and that the *Habendum* ſhould not ſtreighten the deviſe onely to the Iſland [x].

A man ſeiſed of a meſſuage holden in ſoccage in Fee deviſed the ſame in theſe words; I deviſe my meſſuage where I dwell to my Coſin H.

[q] T. 2 Jac. *Horton* verſ. *Horton*. B. R. Croke part 2. pl. 4.

[r] M. 30 Eliz. C. B. Sir *Anthony Dennyes* caſ. Leon. part 2. fo. 190.

[†] P. 16 Eliz. in B.R. Leon. part 2. fo. 221.

[t] T. 30 Eliz. rot. 1160. *Whisker* and *Cleytons* caſ. Leon. rep. fo. 156.

[v] Pl. Com. fo. 342. *Bret* and *Rigdens* caſe.

[x] T. 28 Eliz. C. B. rot. 1458. *Wiſeman* and *Wiſemans* caſ. Leon. 57, 58.

and his aſſigns for 8 years, and my Coſin H. ſhall have all my inheritances, if the law will: it was adjudged, that it was a good deviſe in Fee of the meſſuage, and that by the generall words of the will all his inheritances did alſo paſs [a].

[a] Moors rep. fo. 873. n. 1218. M. 11 Jac. B. C. *Wedlock* verſ. *Harding*. Godbolt, fol. 208. Hob. rep. fo. 7.

A. ſeiſed of lands in Fee deviſed them to his wife for life, and after to his two ſons, if they had not iſſue males, for their lives; and if they had iſſue males, then to their iſſue males; and if they had not iſſue males, then if any of them had iſſue male, to the ſaid iſſue male; the wife died, the ſons entred into the lands, and then the eldeſt ſon had iſſue male, who afterwards entred; the younger ſon put out the iſſue: it was adjudged, that by the birth of the iſſue males, the lands were deveſted out of the 2 ſons, and veſted in the iſſue male of the eldeſt ſon, and that he had an eſtate tail therein [b].

[b] H. 13 Jac. B. R. *Blandford's* caſe. Godbolt, fo. 266. Moors rep. fo. 846. n. 1146.

A Copyholder deviſeth his lands unto his wife for life, and that after his deceaſe the wife or her Executors ſhould ſell the land, and ſurrendered to the uſe of his will, which was entred thus; viz. to the uſe of his wife for life, *ſecundum formam ultimæ voluntatis*: and whether ſhe had in the lands an eſtate for her life, or an eſtate in Fee to ſell, was the queſtion. It was the opinion of the Court, that ſhe had an eſtate in it for her own uſe for her life, and alſo an eſtate in Fee to ſell, otherwiſe the clauſe *ſecundum formam ultimæ voluntatis* ſhould be void [c].

[c] M. 29 Eliz. in B. R. Godbolt, fo. 46.

A. ſeiſed of land in Fee deviſed it unto B. and C. equally and to their heirs: adjudged that they are joyntenants, and not tenants in common. But if the deviſe had been to B. and C. equally to be divided, they are tenants in common. If the deviſe had been, equally to be divided between them by J. S. till ſuch diviſion be made they are joyntenants. M. 31 Eliz. B. R. *Dickons* and *Marſhes* Caſe. *Goldsbr.* fo. 182, 183 [d].

[d] *Lowen* and *Bedds* caſe. Anderſ. rep. part. 2. caſ. 10. M. 37 & 38 Eliz. C. B. *Lowen* verſ. *Cox*. Dyer 25.

A. deviſed his lands to his wife for life, and after her death to J. his eldeſt ſon and his heirs, upon condition, that he ſhould grant to C. his ſecond ſon and his heirs a rent of 4 l. *per annum* out of the ſaid tenements; and if J. died without heirs of his body, that the ſaid lands ſhould remain to C. and the heirs of his body; and died; the wife entred and died; J. granted a rent of 4 l. to C. and his heirs out of the lands with clauſe of diſtreſs: it was reſolved that J. had an Eſtate tail; but by the limitation of the will, he is to make his grant of this rent, which being by the appointment of the donor, is not *contra formam doni*, but ſtands with the gift, and ſhall bind the iſſue in tail *.

* P. 15 Jac. B. R. rot. 204. *Dutton* and *Engrams* caſe. Croke part 2. fo. 427.

A man let ſeveral houſes and lands by ſeveral leaſes for years rendring ſeveral rents amounting unto 10 l. *per annum*, and made his will in this manner; *ſcil.* I bequeath the rents of *D.* to my wife for her life, the remainder over in tail: it was reſolved, that by this deviſe the land it ſelf ſhould paſs. For it appears his intent was to make a deviſe of his lands and tenements, and that he intended to paſs ſuch an eſtate as ſhould have continuance for a longer time then the leaſes ſhould endure: and the words are apt enough to convey the lands, it being an uſuall

an uſuall manner of ſpeech of ſome men, who name their land by their rents [f].

If one by his will deviſe his land to his wife in the firſt place, and then ſaith, My will is, that my ſon A. ſhall have it after my wife's death, and if my wife die before my ſon B. that then my ſon A. ſhall pay to B. 10 l. by the year during the life of B. and alſo 100 l. to J. S. in this caſe A. ſhall have the fee-ſimple of the land [g].

A man having lands in Fee-ſimple, and goods to the value of 5 l. onely, deviſed to his wife all his eſtate, paying his debts and legacies, his debts and legacies amounting unto 40 l. it was adjudged that all his lands did paſs by the deviſe, and that the deviſee had a fee-ſimple in the lands, by reaſon of the word *paying*; for they are to be paid preſently, which cannot be if the lands paſs not in Fee [h].

If a man hath lands in Fee and lands for years, and he deviſeth all his lands and tenements, the fee-ſimple lands onely paſs, and not the leaſe for years; but if he hath onely a leaſe for years, and no freehold, and deviſeth all his lands and tenements, the leaſe for years ſhall paſs [a].

A. deviſed his land in *London* to his ſon and his heirs after the death of his wife, and if his daughters overlive his wife and his ſon and his heirs, then his daughters ſhould have it for life, and after their deceaſe J. and R. ſhould have the ſame, and that they ſhould pay 6 l. 16 s. yearly to the Company of Merchant-Tailors, to be diſpoſed of to charitable uſes. In this caſe 3 points were argued. 1. Whether the wife had an eſtate for life by implication of the will: and it was reſolved that ſhe had. 2. Whether the ſon had a fee-ſimple or fee-tail: and it was reſolved that he had a fee-tail by implication of theſe words, *viz.* (if his daughters ſurvive his wife and his ſon and his heirs,) whereby it's implied that the heirs there intended are the heirs of his body, and not his heirs in Fee; for ſo long as the daughters live, the ſon could not die without a collateral heir. 3. What eſtate J. and R. have after the death of the daughters: it was reſolved they have a fee-ſimple by reaſon of the annual payment of the mony; and it is not to be regarded what annual value the land is of over and above the ſums they pay: for every ſum of mony paid or paiable doth cauſe the deviſee to have a Fee-ſimple. And *Coke* Chief Juſtice ſaid, that a deviſe to a man and his ſucceſſors is a deviſe of a fee-ſimple, without the word (*heirs*,) becauſe it implies a fee-ſimple, though it want the expreſs words [b].

F. ſeiſed of Gavel-kind lands had 3 ſons, and deviſed part of his land to one, part to another, and another part to the third, and if any die without iſſue, the other ſhall be his heir: adjudged that it was an entail in every one, and a fee-ſimple by the word (*heir*) to the other [c].

A man hath iſſue a ſon, and land is deviſed to the father, *Habendum ſibi & heredibus de corpore ſuo legitime procreandis*, and after the deviſee hath iſſue another ſon: the ſecond ſon ſhall have the land [d].

A man

[f] M. 45 Eliz. in C. B. rot. 125. *Kerry* and *Dirricks* caſe. Croke part 2. fo. 104.

[g] H. 17 Jac. B. R. *Spicers* caſe.

[h] T. 1651. B. R. *Kirman* and *Johnſons* caſe. Styles rep. 293.

[a] T. 7 Car. in B. R. *Roſe* and *Bartlets* caſe. Crok. part 1. fo. 213.

[b] T. 14 Jac. B. R. Moors rep. fo. 853. n. 1164.

[c] H. 32 Eliz. rot. 120. C. B. *Carters* caſe. M. 13 Jac. *Sparke* verſ. *Purnell*. Moors rep. fo. 864. n. 1190.

[d] Dyers Reading upon the Stat. of Wills, § 18.

A man deviſeth land to his ſon, and if he dieth without iſſue, or before his age of 21, it ſhall remain to another; the ſon had iſſue, but dies before the age of 21. Adjudged that his iſſue ſhall have the land, and not he in the remainder: and (*or*) was conſtrued for (*and*) *.

* M. 37, 38 Eliz. C. B. rot. 1249. *Sowell* verſ. *Garret.* Moors rep. fo. 422. n. 590.

If one deviſe his lands to his wife for years, the remainder to his youngeſt ſon and his heirs, and if either of his 2 ſons die without iſſue, &c. that it ſhall remain to his daughter and her heirs; the younger ſon dieth in the life time of the father, and after the father dieth: by this deviſe the elder ſon ſhall have the lands in tail [f]. Or if one deviſe his land to his wife for life, and after to his ſon, and if his ſon die without iſſue, having no ſon, (or having no male,) that then it ſhall go to another; by this deviſe the ſon hath an eſtate tail to him and the heirs of his body [g]. Or if lands be deviſed to a man and woman unmarried, and the heirs of their two bodies, or to the husband of A. and wife of B. and the heirs of their 2 bodies; by theſe deviſes are created eſtates in tail [h].

[f] Dy. fo. 122.

[g] T. 7 Jac. C. B. *Robinſons* caſe.

[h] Coke 1. Inſt. 20. 26. Pl. Com. fo. 35.

A man ſeiſed of land holden *in Capite* deviſed it to his wife for life, and after her deceaſe his ſon *John* to have it; and if his ſon *John* marry, and have by his wife any iſſue male of his body lawfully begotten, then his ſon to have it; if no iſſue male, then his ſon *Tho.* to have the houſe; and if *Tho.* marrie, having iſſue male of his body, his ſon to have the houſe after his deceaſe; and if any of his ſons or iſſue males goe about to alien or mortgage the houſe, then the next heir to enter, &c. It was reſolved, firſt, that the ſons had an eſtate tail in them ſeverally, and to the heirs males of their bodies; for theſe words, [if he hath no iſſue male, his ſon *Tho.* to have it] are ſufficient to create an eſtate tail to *John*, and ſo of the reſt. 2. Reſolved, that no condition or limitation, be it by act executed, or by limitation of uſe, or by deviſe by his laſt will, can bar tenant in tail to alien by ſuffering of a common recovery [i].

[i] H. 8 Jac. *Sondays* caſe. Coke lib. 9. fo. 128.

If lands be deviſed to A. B. and his heirs males, or his heirs females, without ſaying [of his body;] by this deviſe A. B. hath an entail: but if ſuch a limitation be by deed, it's a fee-ſimple [k].

[k] Inſt. part 1. § 25. 31 H. 6. 27. 9 H. 8. 27. Pl. Com. 414.

One deviſed all his lands to another, and the heirs of his body begotten; and after in the ſame will deviſed, that if the deviſee die, the ſaid lands ſhould remain to another in Fee: the Court held, that the deviſee hath an eſtate tail by the firſt words [l].

[l] H. 14 Eliz Anderſ. rep. caſ. 84. 88.

The father tenant for life of certain lands, the remainder in Fee to the ſon, the ſon deviſed the ſame in theſe words, viz. I deviſe to D. my wife the lands which I have or may have in reverſion, after the death of my father, paying therefore yearly during her life to the right heirs of my father 40 s. and died, his father living: *per Curiam*, no eſtate paſſed by this deviſe but for term of the life of the wife, and that ſhe ſhould not pay the 40 s. untill the reverſion did fall after the death of the father, for the father had not right heirs during his life [m].

[m] Dy. 371.

R. D. ſeiſed in Fee of a houſe, and poſſeſſed of goods, made his will in theſe words; viz. The reſt of my goods, lands, and movables whatſoever,

whatſoever, after my debts, legacies and funerals paid, I give to my 3 children, J.T. and M. equally to be divided amongſt them: It was adjudged that they have an eſtate onely for life in the houſe, and are tenants in common, and not joyntenants [n].

W. C. by his will deviſed a meſſuage in theſe words, viz. I give to A. L. my Coſin the fee-ſimple of my houſe, and after her deceaſe to W. her ſon: A. L. had an eſtate for life, and her ſon a fee-ſimple in remainder; and ſo it was adjudged [o].

If one deviſeth his lands in this manner, viz. I give my land in D. to A. B. to the intent that with the profits thereof he ſhall bring up my child or my children, or to the intent that with the profits thereof he ſhall pay yearly 10 l. or that out of the profits thereof he ſhall pay to J. M. 10 l. by theſe deviſes A. B. hath onely an eſtate for life, albeit the payments to be made be greater then the rents of the land: otherwiſe it is in caſe the ſum of mony is to be paid preſently, and not appointed to be paid out of the profits of the land, in which caſe A. B. ſhould have a fee-ſimple [p].

A. ſeiſed of divers lands in A. B. and C. the lands in C. being in him by mortgage forfeited, deviſed the lands in A. and B. unto ſeveral perſons, and then adds this clauſe in his will; All the reſt of the goods, chatells, leaſes, eſtates, mortgages, whereof he was poſſeſſed, he deviſed to his wife after his debts and legacies paid, made his wife Executrix, and died: adjudged that in the mortgaged lands onely an eſtate for life paſſed to the wife, and not a Fee [q].

One deviſeth his lands to his 2 ſons and the heirs of their bodies, and that the Executors ſhall have them untill they come to their ſeveral ages of 21; the one attains to the age of 21: the queſtion was, whether he might enter. It was ſaid, they were joyntenants, and their Executors ſhould hold them till they both came of the age of 21 years. But it was holden otherwiſe by the Court, for the words [untill they come to their ſeverall ages] ſhall be conſtrued, *reddendo ſingula ſingulis*, that when either of them come to the age of 21 years, he ſhould then have his part and poſſeſſion [r].

R. deviſeth his land to his brother *John*, and if he die having no ſon, the land ſhould remain to *William* for his life, and if he die without iſſue, having no ſon, it ſhall remain to the right heirs of the deviſor: *John* his brother had an eſtate tail to his iſſue males; but *William* had but an eſtate for life, or to his heirs females, becauſe having no ſon is merely contingent [s].

M. ſeiſed of lands in Fee deviſeth them to R. his daughter for life, and if ſhe marry after my death, and have iſſue of her body lawfully begotten, then I will that her heir after my daughter's death ſhall have the land, and to the heirs of their bodies begotten, the remainder in Fee to a ſtranger. It was adjudged that R. had not an eſtate in tail, but onely for life, the inheritance in her heir by purchaſe reſting in abeyance all her life, and ſettling in the inſtant of her death [t].

[n] T. 35 Eliz. ro. 403. P. R. *Deacon* verſ. *Marſh.* Moors rep. fo. 594. n. 808.

[o] P. 17 Eliz. *Baker* and *Raymonds* caſe. Anderſ. rep. c. 251.

[p] Coke lib 6. fo. 16. *Colliers* caſ. lib. 3. fo. 20. 21. *Boraſtons* caſ. Brook tit. Eſtates, pl. 38. Brook tit. Teſtament, pl. 18. 32, 33 Eliz. *Wellock* and *Hamonds* caſe.

[q] T. 10 Car. B. R. *Wilkinſon* and *Merrilands* caſ Crook part 1. fo. 323.

[r] M. 8 Jac. in P. R. *Aylor* and *Chep* caſe. Crook part 2. fo. 259.

[s] M. 42 & 43 Eliz. *Milliner* verſ. *Robinſon.* Moors rep. fo. 682. n. 939.

[t] H. 35 Eliz. ro. 467. *Clerke* verſ. *Day.* Moors rep. fol. 553. n. 803.

Deviſe of a rent with a clauſe of diſtreſs is a good Rent charge; but otherwiſe in a grant [c].

[c] T. 40 Eliz. rot. 245. *Kingſwell* verſ. *Cawdrey*. Moors rep. fo. 592. n. 798.

Deviſes of Lands with Limitations and upon Condition. What Condition in a Deviſe ſhall be good, what not: what words ſhall make a Condition, what not: and what Eſtate ſhall paſs to the Deviſee by implication.

P. Seiſed of lands in Fee, and having 4 ſons and one daughter, deviſeth by his will in writing 20 l. to every one of his younger ſons and to his daughter, to be paid by his eldeſt ſon at their age of 21 years; and if the eldeſt doth not pay, he deviſeth the lands, which he had before deviſed to the eldeſt ſon and his heirs, to his younger ſons and his daughter and to their heirs. In this caſe ſeverall points did ariſe. 1. If the eldeſt ſon takes by diſcent or deviſe: adjudged that he takes by diſcent; and that the breach of the payment is a condition precedent to the deviſe of the land to the younger ſons and daughter, and no condition or limitation to the eſtate of the eldeſt ſon. 2. If the breach of payment with any of them giveth the lands to the ſons and daughter, or ſolely to him, her, or them, to whom it's not paid: reſolved, to them all; and though 3 of them have received their portions, yet for not payment to the 4th, the eldeſt ſon ſhall loſe the land, and all the 4 ſhall have it as joyntenants. 3. It was likewiſe adjudged, that the entry of one in his own name, and in the name of the other, upon the new title to be inveſted, was good, becauſe joyntenants [a].

[a] H. 41 Eliz. rot. 1060. *Hainſworth* verſ. *Prettie*. Moors rep. fo. 644. n. 891.

Deviſe of land upon truſt and confidence to doe ſuch an act doth not make a condition [b].

[b] M. 34 & 35 Eliz. *Gibons* verſ. *Martiward*. Moors rep. fo. 594. n. 806.

A Copyholder of lands in Borough-Engliſh, having 3 ſons and one daughter, deviſed his lands to his eldeſt ſon, paying to his daughter and every one of his other ſons 5 l. within 2 years, and ſurrendred to the uſe of his will; the eldeſt ſon was admitted, and did not pay the 5 l. within 2 years: in this caſe it was adjudged, that though the word (*paying*) in a will maketh a condition, yet it ſhall be conſtrued to be a limitation; for if it ſhould be a condition, the ſame ſhould deſcend to the eldeſt ſon, and then it ſhould be at his pleaſure whether the daughter or brothers ſhould be paid or not: therefore the law will conſtrue it to be a limitation, of which the youngeſt ſon ſhall take advantage [c].

[c] 33 Eliz. B. R. *Wellock* and *Hamonds* caſe. C. lib. 6. *Collyers* caſe.

A man deviſed land to his wife, upon condition, that ſhe ſhould bring up his eldeſt ſon at School, and in vertue-learning, and that after the death of his wife, the land ſhould remain to the 2. ſon in fee, and died; the wife entred, and did not educate, &c. the eldeſt ſon at his full age entred for the condition broken. Adjudged, 1. that a condition might be annexed to a will by the Stat. 32 H. 8. of Wills, which giveth liberty to a man to deviſe for the advancement of his wife, &c.

2. that

2. that a particular eſtate may be upon condition, though the remainder be without condition: 3. he in the remainder ſhould not take advantage of the condition, but the heir, becauſe he is prejudiced in the inheritance by the deviſe [d].

[d] H. 3 Mar. *Warrens caſ.* Dy. fo. 127.

A. deviſed land to B. *reddendo & ſolvendo* 20 s. to C. yearly, and died; the 20 s. is not paid: adjudged that the heir of A. may enter for breach of the condition *.

* P. 37 Eliz. C. B. rot. 527. *Fox* verſ. ....

A man deviſeth land to B. his eldeſt daughter and her heirs, that ſhe may pay to C. her younger ſiſter yearly 30 l. and dies without other iſſue; B. doth not pay the 30 l. C. enters. *Et per Curiam* her entry was congeable, becauſe that *(ſhe may pay)* maketh a condition. 2. C. for the condition broken may enter into one moiety, but for the other moiety the condition is diſpenſed with *per act en ley, ſcil.* the deſcent to B. and for that the condition ſhall be apportioned [g].

[g] T. 30 Eliz. rot. 568. *Crickmer* verſ. *Patterſon.*

Fr. B. ſeiſed of a houſe in Fee, 4 *Eliz.* deviſeth it to *Agnes* his wife for life, and after to the heirs of his body begotten, and after to *Tho. B.* his brother in Fee; Proviſo, that if the ſaid *Agnes* ſhall clearly depart out of *London*, and inhabit in M. in *Suffolk*, then ſhe ſhall have 10 l. yearly paid her out of the ſaid houſe: *F. B.* dieth without iſſue; *Tho. B.* dieth, *R. B.* being his next heir: 15 *Eliz. Agnes* totally departed out of *London*, and inhabited in M. in the ſaid County of S. *R.* releaſes to *Agnes*. It was adjudged that this Proviſo doth determine the eſtate of *Agnes* before entry, inſomuch as ſhe is but tenant at ſufferance, and the releaſe of *R.* to her *nihil operatur*: for though there be no words, that her eſtate ſhall ceaſe or be void; yet they are implied by the will, in theſe words, *ſcilicet*, that then ſhe ſhall have ſuch a rent out of the houſe, which cannot be without a determination of the eſtate [h].

[h] M. 31 Eliz. rot. 54. *Allen* verſ *Hill.*

A. maketh a leaſe to B. of certain land, upon condition that he ſhould not alien to any but to his children; the leſſee deviſeth part of the land to A. after the death of his wife: adjudged that the wife ſhould take nothing, but it ſhould goe to the Executors; and the death of the wife is a demonſtration when the children ſhould take [i].

[i] T. 2 Jac. rot. 710. *Horton* verſ. *Horton.*

T. being ſeiſed of ſeveral parcels of land in Fee, deviſeth one parcell of it to his eldeſt ſon in tail, and another parcel to his younger ſon in tail; *Proviſo ſemper*, that if any of his children alien or demiſe any of his lands to them deviſed before they come to the age of 30 years, then the next brother ſhall enter: the eldeſt brother entred into his part, and demiſed that for years before his age of 30 years; whereupon the younger brother entred by force of the limitation in the will; and after the younger brother, before he came to the age of 30 years, demiſed the land for years, into which he had entred; whereupon the eldeſt brother entred. Adjudged, 1. that this is a limitation, and the eſtate ſhall be to them till they alien; and upon the alienation it ſhall goe to the other: 2. when one brother had entred into the land by force of the limitation,

mitation, that land is discharged of the limitation in the will for ever [k].

[k] H. 3 Eliz. rot. 904. *Spittle* verſ. *Davyes.*

A man deviſeth land to A. and his heirs, provided, that if he die within age, that then the land ſhall remain to B. and his heirs: adjudged a good deviſe to B. if A. dieth within age; but that is not by way of remainder, but executory deviſe [l].

[l] M. 33, 34 Eliz. B. R. rot. 1140. *Hoe & Gerrald's* caſe.

A man had iſſue a ſon and 2 daughters, and he deviſed his land to his ſon and his heirs, and if he die without iſſue within three years, then his Executor ſhall ſell his land; the ſon dieth within three years without iſſue: adjudged that the Executor may enter and ſell the land [m].

[m] M. 41, 42 Eliz. *Mollineux* caſe. T. 38 Eliz. rot. 867. B. R. *Fulmerſtons* caſe.

A man had iſſue 3 ſons, *John*, *Thomas*, and *William*, and deviſeth his lands in this manner; I deviſe my land to my ſon *John* after the death of my wife, to him and the heirs of his body lawfully begotten, in Fee-ſimple; and if he die in the life of my wife, that then my ſon *William* be his heir; the deviſor dieth, *John* had iſſue and dieth in the life of the wife: adjudged, that the iſſue ſhall have the land after the death of the wife, and not *William*; for it amounteth to a deviſe to the wife for life, the remainder to *John* in tail, the reverſion to *William* in Fee upon a contingency: for ſo it appeareth his intent to be, and not to abridge the eſtate tail expreſly given to *John*, by his death in the life-time of the wife, but onely to limit the remainder in Fee upon this contingency [n].

[n] H. 5 Car. B. R.

J. S. ſeiſed of the Manor of *Warner*, and of the Manor of *Charcall*, deviſeth the Manor of W. to J. S. in Fee, and the Manor of C. he deviſeth to M. for life, and if M. dies, any then of my Coſin F. ſons living, then I will my ſaid Manor of C. unto him that ſhall have my Manor of W. the teſtator dieth; J. S. enters into the Manor, and conveys it to a ſtranger; M. dieth. The queſtion was, if J. S. ſhall have the Manor of C. and adjudged that he ſhall not, becauſe he hath not the Manor of W. at the time of the death of M. for the deviſe was, that the ſon of J. S. which hath the Manor of W. ſhall have this Manor of C. for it's not ſufficient that he hath the Manor of W. at the time of the death of the deviſor, for there are two (*thens*,) therefore he that ſhall have this Manor, ought to have 2 notes, 1. that he be the ſon of J. S. 2. that he hath the Manor of W. at the time when the deviſe of the reverſion of the Manor of C. is to take effect [o].

[o] T. 36 Eliz. C. B. *Brown* verſ. *Peere.* rot. 1145.

A. had 3 ſiſters living, one dieth, and hath iſſue a daughter, and deviſeth his land to all his ſiſters, between their heirs equally to be divided: adjudged that the daughter of the ſiſter which is dead ſhall take nothing by this deviſe [p].

[p] M. 3 Car. B. R. inter *Taylor* & *Eoskins.*

H. M. was ſeiſed of land and a houſe called *the white Swan*, made his will in writing, and deviſed all his Fee-ſimple lands and tenements to H. M. his ſon and the heirs males of his body, and for default of ſuch iſſue, to his right heirs; and deviſeth his houſe or tenement wherein *William Nicholls* dwelleth, called *the white Swan in Old-ſtreet*, to *Henry Gallant* his daughter's ſon for ever: it was found by

by the Jury, that *William Nicholls* at the time of the will making and of the deviſor's death inhabited the alley of the ſaid houſe and three upper rooms therein, and that divers other perſons at the ſame time held the garden and other places in the ſaid houſe. Adjudged, 1. that *H. Gallant* had an eſtate in Fee-ſimple in the houſe, by reaſon of the words [*for ever*;] and not like *Ludhams* caſ. 19 Eliz. Dy. 357. 2. Adjudged that the whole houſe paſſeth by this deviſe, becauſe the deviſe being, [*that houſe or tenement called the white Swan,*] both of them do neceſſarily import the whole houſe: for the ſign of *the white Swan* cannot be intended to refer to three rooms; and the words after, viz. [*wherein William Nicholls dwelleth*,] do not abridge or alter that deviſe; and the houſe being named by the particular name of *the white Swan*, although *William Nicholls* never inhabited therein, yet it paſſeth by the deviſe. Vid. lib. 4. fo. 48. *Ognells* caſe [q].

[q] M. 4 Car. *Chamberlain* verſ. *Turnor.* B. R. Crook part 1. fo. 129.

2 Coparceners, and one deviſeth her property to a ſtranger, without other words: there the deviſee had but an eſtate for life; for the word [*property*] doth ſignifie but her part in the land [r].

[r] 28 Eliz. *Eraſmus Cookes* caſe.

B. deviſeth to *Agnes* his wife my houſe and all the lands to it belonging, to diſpoſe of at her will and pleaſure, and to give it to which of my ſons ſhe will: adjudged that by the firſt words, viz. [*I give*, &c. *to diſpoſe at her will and pleaſure,*] ſhe had but an eſtate for life; and the other words, [*and to give it to which of my ſons ſhe will,*] do adde an authority to diſpoſe of the reverſion to any of her ſons which ſhe pleaſe †.

† P. 2 Car. B. R. *Daniel* verſ. *Upley.*

A man was ſeiſed of a farm called by the name of *Heſelands in Cuckfield*, and of other lands in *Cleyton* therewith occupied; and being ſo ſeiſed made his will in this manner; As concerning the diſpoſition of all my lands and rents, &c. he deviſeth all thoſe his lands and tenements lying in the pariſh of *Cuckfield* called *Heſelands* to his wife for life, and after her deceaſe that it ſhall remain to *John* his ſon and his heirs; and after divers clauſes, he wills, that if *John* dieth without iſſue, *Heſelands* ſhall remain to his three daughters in Fee. Adjudged that onely ſo much of the lands as are in the pariſh of *Cuckfield* ſhall goe to the daughters, but none of the lands in *Cleyton* [t].

[t] H. 1 Jac. B. R. *Tutteſham* verſ. *Roberts.* Crook part 2. fol. 21. Dyer fol. 261. T. 41 Eliz. B. R *Wodden* verſ. *Osborn.* Crook part 3. 674.

A. deviſeth the fee-ſimple of his bigger houſe in *Soper-lane* to his Coſin *Alice Ludham*, and after her deceaſe to W. L. her ſon, who was her heir apparent, and dieth: adjudged that *Alice* hath an eſtate for life, the remainder to *William* for his life, the fee-ſimple to A [v].

[v] Dy. fo. 357.

A. by his will in writing reciteth, that whereas he had joyned his ſon *Matthew* purchaſer with him in part of his land in T. the reſidue of his lands in T. he giveth to his 2 ſons *Henry* and *Michael*, upon condition, that if they ſell the ſaid lands to any but to *Matthew*

his ſon, then *Matthew* to enter, and to hold it as of his gift; and adds this clauſe, *Item*, all the houſes and lands which I have given between my ſons is to this purpoſe, that they all ſhall bear part and part like going out of all my ſaid houſes and lands towards the payment of my wife 40 l. a year during her life, which I am bound to pay; and which of my ſons refuſe to bear their part, I will that he or they ſhall enjoy no part of my bequeſt given unto them, but it ſhall goe to the reſt of my well-willing ſons. Adjudged, that *Henry* and *Michael* had an eſtate for life onely, and no eſtate in Fee; becauſe the 40 l. *per annum* is to be paid out of the land and houſes; and not like to *Collyers* caſe, lib. 6. fo. 16. *Boraſtons* caſ. lib. 3. fo. 4 E. 6. Broke Eſtates 78. 26 H. 8. Broke Tenements pl. 18. 2. Adjudged, that although he doth recite that he and *Matthew* were joynt purchaſers; yet an eſtate for life onely paſſeth, for no intent appeareth that a Fee ſhould paſs, and it doth not appear by the will of what eſtate he was joynt purchaſer, and it may be it was but for life; and the reciting that he was joynt purchaſer, was not to ſhew what eſtate ſhould paſs by the will, but onely what land was to paſs, and in what pariſh. 3. The condition that he ſhould not alien to any but to *Matthew*, is a condition void in law *.

* M. 3 Car. rot. 842. *Anſley* verſ. *Chapman.* Croke part 1. fo. 157.

B. hath iſſue 3 ſons, *John*, *William*, and *Richard*, and being ſeiſed of divers lands lying in A. B. C. deviſeth all his lands to *John* his ſon and his heirs, and if he dieth without iſſue, he deviſeth his lands in A. to *Wil.* and his heirs in Fee; *Item*, I deviſe my land in B. to *Richard* in Fee. Whether this was a good deviſe to *R.* after the deceaſe of *John* without iſſue, or an immediate deviſe to *R.* and a countermand of the will to *John quoad* thoſe lands, was the queſtion: and adjudged that it was a limitation by way of remainder to *R.* and no countermand; for the words [*Item, I deviſe*, &c.] ſhall be conſtrued, that if *John* dieth without iſſue, that then the land ſhall remain as the deviſe is to *Will.* and the firſt deviſe to *John*, as a deviſe to him and the heirs of his body, and no Fee x.

x T. 8 Jac. rot. 1880. *Brown* verſ. *Jervis.* Croke part 2. fol. 290.

A. deviſeth part of his land to B. another part to C. and another part to D. and if any of them die without iſſue, the ſurvivor ſhall have all his land ſo dying: adjudged that the ſurvivor ſhall have the part but for life, and the words [*all his land*] ſhall not be conſtrued to goe to the eſtate of the land, but to the land it ſelf y.

y H. 36 Eliz. *Deſtland* verſ. *Eraſmus Cooke.*

A. being ſeiſed of Gavel-kind land, deviſed his lands to husband and wife, the remainder *proximo hæredi maſculo de eorum corporibus legitime procreato in perpetuum*: the eldeſt ſon taketh onely an eſtate for life. Dy. 133. b. But by *Popham*, if [*proximo*] were omitted, it would be an eſtate tail. Vid. Dy. fo. 337. P. 16 Eliz. *Humfryſons* caſe z.

z P. 16 Eliz. *Humfryſons* caſ. Dy. fo. 337. 133.

A man had iſſue 3 ſons, *John*, *Edw.* and *William*, and had lands in 3 towns, *ſcilicet*, A. B. C. by his will he deviſeth his lands in A. to *John* his eldeſt ſon, and the lands in B. to *Edw.* his ſon, and the lands in C. to *William* his ſon; and if any of them die, the other ſurviving ſhall be his heir; *John* dieth having iſſue: if the lands in A. ſhall goe to the 2 brothers, or to the Iſſue of *John*, was the queſtion. Reſolved, becauſe nothing but the free-hold paſſed to *John*,

John, the reverſion deſcending to him, his eſtate was merged, and therefore could not revive, and veſt the remainder in *Edward* and *William* [a].

J. G. ſeiſed of lands in Fee deviſed them to his wife for life, the remainder to A. and his heirs, upon condition, that after the death of his wife, he grant a rent charge to B. and his heirs; and if A. dieth without heirs of his body, that then the ſaid lands ſhall remain to B. in tail; the wife dieth, A. granteth the rent accordingly, B. grants the rent over; A. dieth without heirs of his body, and the ſecond grantee diſtrains for the rent arrier. Adjudged, that B. the grantee of the rent was in by the deviſor, and not by the tenant in tail; and therefore the rent in Fee may continue, though the entail be ſpent: and the deviſor had power to charge the land as he pleaſed [b].

A man deviſeth land to A. *habendum* to him and the heirs of his body, to the uſe of him and his heirs: adjudged that it is an eſtate tail, and the words, [*to the uſe of him and his heirs*] are but declaratory, and it's all one as if he had ſaid to his heirs aforeſaid [c].

A man deviſeth land to the eldeſt ſon and his heirs for his part; *Item*, he doth deviſe to his ſecond ſon ſuch land for his part, without limiting any eſtate: yet it ſhall be a fee in the ſecond ſon, for that he had reference to the part of the eldeſt ſon [d].

A man ſeiſed of tenements in *London* deviſeth the ſame to two, upon condition, that they ſhould pay to his wife 10 l. *per annum* iſſuing out of the ſaid tenements at 2 feaſts; and if the rent be behind by the ſpace of 40 days being demanded, that it ſhould be lawfull for the wife to diſtrain: *per Curiam*, it's a good condition; and that if the rent be behind, yet the wife cannot diſtrain before a demand of the rent: but the heir of the husband might enter for the condition broken, though the wife did not demand the rent *.

A. deviſeth his lands to his eldeſt ſon and his heirs, upon condition that he ſhould pay 20 l. apiece to his 2 daughters, at their ages of 21. It's a limitation, and no condition. But if the deviſe had been to his ſecond ſon upon condition that he ſhould pay 20 l. apiece to his two daughters, *ut ſupra*; adjudged that it's a condition, and no limitation. 2. The daughters could not enter for condition broken without demand, and notice given that they are of the age of 21. 3. None could enter without their expreſs order and direction [f].

A. ſeiſed of certain lands in Fee, having iſſue three ſons, viz. *William* his eldeſt by one Venter, and *Fr.* and *John* by another Venter, deviſeth theſe lands to his wife for life, and after to his 2 ſons *Fr.* and *John*, that they ſhould pay to his eldeſt ſon *William* and his heirs annually 3 l. and if either of them or their heirs do ſell the ſame, then the gift ſhall ſtand as void, and ſo to return to his heirs again. Adjudged, that they have a Fee by the words [*if they or their heirs ſell*,] and by reaſon of the 3 l. to be paid annually: and ſo the condition, that they ſhould not ſell, is repugnant to an eſtate in Fee, and by conſequence void [g].

A man.

[a] P. 7 Jac. rot. 155. *Wood* verſ. *Ingerſole*. Croke part 2. 260.

[b] M. 15 Jac B. R. *Gouldwells* caſ. Pophams rep. fo. 131.

[c] T. 14 Jac. *Cooper* verſ. *Franklin*. Croke part 2. fo. 401.

[d] P. 14 Jac. *Goſſe* verſ. *Haywood*.

* H. 18 Eliz. Dy. fo. 348.

[f] H. 45 Eliz. rot. 817. *Curties* verſ. *Wolverſton*. Croke part 2. fo. 57.

[g] P. 41 Eliz. C. B. rot. 1043. *Shailand* verſ. *Baker*. Crok. part 3. fo. 745.

A man ſeiſed of Land in Fee deviſeth the ſame to my ſon *Francis* after the death of my wife, and if my daughters fortune to overlive their mother and *Fr.* and his heirs, then I deviſe the land to them for their lives, and after their deceaſe to B. and C. my 2 nephews, and that they and their ſucceſſors ſhall pay 3 l. yearly to ſuch a Company in *London* as I intend for ever. Reſolved that *Francis* hath an eſtate tail by reaſon of the limitation over, viz. [*if his ſiſters ſurvive him and his heirs:*] for *heirs* in this place is intended heirs of his body; for the limitation being to his ſiſters, it's neceſſary to be intended, that if he ſhould die without iſſue of his body; for they are his heirs collateral. And therefore if a man hath 2 ſons, and deviſe land to his younger ſon, and if he die without heir, then it to remain to his eldeſt ſon and his heirs; this is an eſtate tail in the younger ſon, otherwiſe the remainder ſhould be void. 19 H. 8. fo. 9. Vid. Dy. 333. *Chapmans* caſ. Coke lib. 6. fo. 16. *Wilds* caſ. 2. The nephews have a Fee, by reaſon they have paid a conſideration for it, viz. an annual ſum, and the words [*if they or their ſucceſſours deny the payment*] ſhew the intent it ſhould goe to the heirs. 4 E. 6. Brook tit. eſtate, pl. 78. 3. It was adjudged, that it was no contingent limitation to the nephews, by reaſon of the words [*and if my daughters*, &c. *overlive their mother*, &c. *then they to have it*,] but expreſs, when it was to commence [h].

[h] H. 13 Jac. rot. 66. *Webb* verſ. *Hearnige*. Crook part 2. fo. 415.

Sir *Richard Fulmerſton* deviſed to Sir *Edward Chaſe* and *Fr.* his wife, daughter and heir of Sir *R. F.* certain lands in E. to them and the heirs of Sir E. C. upon condition they ſhould aſſure lands in ſuch places to his Executors and their heirs to perform his will; and if he failed, then he deviſed the ſaid lands in E. to his Executors and their heirs. It was adjudged to be a good limitation, and no condition; for if it ſhould be a condition, it ſhould be deſtroyed by the deſcent to the heir; but it is a limitation, and as an executory deviſe to his Executors, who for non-performance of the ſaid acts entered and ſold, and adjudged good [i].

[i] T. 38 Eliz. rot. 867. *Fulmerſton* and *Stewards* caſ. Crook part 2. fo. 592.

A. deviſeth land to B. and his heir: it's a fee-ſimple, for this word [*heir*] is *nomen collectivum* [k].

[k] 35 Eliz. rot. 467. *Lilly* verſ. *Taylor*. P. 11 Jac. B. R. *Wilkins* verſ. *Whyting*. 39 Aſſ. pl. 20.

C. being ſeiſed of land made his will, and thereby he did give to his 2 ſons 20 acres of land, and if they or any of them do ſell, that then the gift to ſtand void, and ſo it ſhall return again to the ſole heir; and by another clauſe he deviſeth to J. S. and his heirs a rent of 20 l. *per annum* out of the ſame land: *per Curiam* the 2 ſons have an eſtate in Fee-ſimple [l].

[l] P. 40 Eliz. C. B. rot. 1403. *Shayland* verſ. *Baker*.

A man deviſeth land to husband and wife, and after their deceaſe to their children; they have a ſon and a daughter at the time: this deviſe paſſeth but an eſtate to husband and wife for life, the remainder to the 2 children for life. But if they have not any children at the time of the deviſe, then an eſtate tail doth paſs [m].

[m] C. lib. 6. *Wilds* caſe. H. 35 Eliz. *Richardſon* verſ. *Hardley*.

A man deviſeth a houſe to his wife, and that ſhe ſhall have the occupation of *Black-acre* at *Mich.* next enſuing, paying 40 s. to *Nich.* his ſon; and after deviſeth all his lands, tenements and hereditaments

ditaments (excepting the land before ſpecified, and given to his wife,) to *Nich.* his ſon in tail, which was in *May:* adjudged that by the exception of the land before given and ſpecified, nothing of that ſhall paſs to *Nich.* although the eſtate to the wife had been but for one day; but otherwiſe, if it had been, [*except the eſtate before ſpecified and given,*] for then the reverſion would have paſſed to *Nich.* And by *Popham,* if the deviſor had lived after *Michaelmas,* yet the ſon *Nich.* ſhall not have it, becauſe the intent appears to the contrary [n].

A. deviſeth land to B. and to his eldeſt iſſue male: onely an eſtate for life paſſeth: but if the word [*eldeſt*] had been omitted, it would have been an eſtate tail [o].

F. C. ſeiſed of the Manor of S. made his will in writing, and deviſed the Manor to his wife for the term of 30 years in theſe words; viz. for and to theſe intents and purpoſes following: viz. I will and my mind and intent is, that B. my wife ſhall yearly content and pay out of the iſſues and profits of the ſaid Manor to Sir J. S. and others 30 l. and farther willed, that the other legacies given in his Will ſhould be paid by her, and therein deviſed divers Legacies; and farther willed, that his wife ſhould be bound to Sir J. S. and others for the performance of his will. F. C. the deviſor dies; the wife enters on the land, &c. takes the profits, and thereof paies legacies, but not to Sir J. S. and others, &c. whereupon the heir enters as for breach of condition. It was held by the Juſtices, that it was no condition, but a declaration of the teſtator's intention; for to what purpoſe ſhould the wife be bound, if it were a condition? But Judgment was not given in the caſe, for the parties agreed [p].

Leſſee upon condition, that he ſhould not aſſign his term during his life without the aſſent of the leſſor; he deviſeth it without the aſſent of the leſſor: *per Curiam eſt* forfeiture, becauſe the deviſee is in by the deviſor: but otherwiſe, if he had it by aſſignment in law, as Executor [q].

[n] T. 1 Jac. rot. 282. B. R. *Stockwood* verſ. *Swan.* Noyes rep. fo. 13.

[o] T. 27 Eliz. *Lovelace* verſ. *Lovelace.* Crook part 3. fo. 40.

[p] P. 17 Eliz. *Hubbard* and *Spencers* caſ. C. B. Anderſ. rep. caſ. 126.

[q] 31 H. 8. Dy. fo. 45. H. 36 Eliz. B. R. *Colt* & *Tauntons* caſ. Goldesb. fo. 184.

Deviſes of Reverſions, Remainders, and of Rents, when good, and when not, and to whom.

A Seigniory, Rent, or the like, is deviſable as land is [a]: ſo that a man may deviſe a rent *de novo* iſſuing out of land, or a rent iſſuing out of land that was *in eſſe* before.

If rent be granted out of land deviſable by cuſtom, the rent may be deviſed within the cuſtom, for it is of the ſame nature with the land [b].

If one deviſeth a rent of any certain ſum out of his land to be paid quarterly, and ſay not how long the rent ſhall continue; onely an eſtate for life in the rent paſſeth [c].

R. B. being ſeiſed of lands granted a rent charge to R. S. his Executors and aſſigns of 16 li. *per annum* during the life of F. the wife of R. S. R. S. died inteſtate, and F. his wife was adminiſtratrix to him: adjudged,

[a] Perk. S. 538. Litt. S. 585, 586. Dy. fo. 253. F. N. B. 121.

[b] 22 Aſſ. 78. Perk. 135. Roll. abridgment tit. deviſe, E.

[c] Inſt. part 1. 147.

judged, that the adminiſtratrix was no ſpeciall occupant of this rent, but the rent was determined by the death of the grantee, and F. is not an aſſignee by her taking of adminiſtration; for none can make title to the rent, to have it againſt the ter-tenant, unleſſe he be party to the deed, or conveys a ſufficient title under it: yet the grantee might have granted or aſſigned it in his life. If the grant had been to the grantee and his heirs, the heir ſhould be a ſpeciall occupant, as 8 Eliz. Dyer. And *Popham*, Dy. fol. 253. ſaid, if a rent be granted *pur auter vie*, with the remainder over, and the grantee dies, this remainder ſhall commence preſently, becauſe the rent for life determined by the death of the grantee [d].

[d] P. 44 Eliz. rot. 361. *Salter* verſ. *Botelor.* Croke part 3. fo. 901. Moores rep. fol. 664. n. 907.

A rent was deviſed to B. with a clauſe of diſtreſſe, to be paid at the two moſt uſuall feaſts: adjudged a good rent charge; but otherwiſe if it had been by deed *.

* T. 40 Eliz. rot. 245. B. R. Moores rep. fo. 592. n. 798.

Rent is granted to B. and his heirs during the life of C. the queſtion was whether this rent is deviſable by the Stat. 32 and 34. By *Gaudy* and *Fenner* it may, though the eſtate be but a frank-tenement deſcendable. *Popham*, *è contra*. But all agreed, that no generall occupant can be of this rent: and if it were deviſable by cuſtome, that the deviſe would prevent the occupancy [f].

[f] M. 42 and 43 Eliz. rot. 333. Moores rep. fol. 625. n. 858.

A man ſeiſed of land and ſeveral houſes let them to ſeveral perſons by ſeveral leaſes for years, rendring ſeveral rents, amounting *in toto* to 10 li. *per annum*; and afterwards made his will in this manner: As concerning the diſpoſition of all my lands and tenements, I bequeath the rents of D. to my wife for life, the remainder over in tail. The queſtion was, whether by this deviſe the reverſions did paſſe with the rents of thoſe lands. For it was alledged, that the rent divided from the reverſion is not deviſable within the Stat. for he had no inheritance therein. 26 H. 8. 5. Dy. 140. But it was adjudged, that the land it ſelf ſhould paſſe by this deviſe: for it appeareth that his intent was to make a deviſe of all his lands and tenements, and that he intended to paſſe ſuch an eſtate as ſhould have continuance for a longer time then the leaſes ſhould endure; and ſome men name their land by their rents [g].

[g] M. 44 and 45 Eliz. rot. 125. C. B. Croke part 2. f. 104. Moores rep. fol. 640. n. 880.

A. ſeiſed of land deviſed it to his brother and his heirs, and for default of ſuch heirs to B. his ſiſter and her heirs. *Per Richardſon, Hutton, & Harvey*, it is a Fee-ſimple, and ſo the remainder void to B. But *Yelverton* and *Croke* were of opinion, that it was an entail, and the remainder good to B. and his heirs [h]. But it was agreed by all, that if the remainder had been limited to a ſtranger, the firſt eſtate had been a Fee, and the remainder void.

[h] H. 1 Car. rot. 18. 1876. Crok. part 1. fol. 58. 19 H. 8. and 29 H. 8. Dy. 33.

By the cuſtome of *London* a man may deviſe his purchaſed lands in mortmain: A man deviſeth the purchaſed lands to the Prior and Convent *de St. Barth.* &c. *ita quod reddant* to the Dean and Chapter of *P.* 10 li. *per annum*, and if they fail, their eſtate ſhall ceaſe, and ſhall remain to the Dean. *Per Fitzh. & Baldwin* the remainder is void, for a remainder cannot be limited after an eſtate in Fee: and the Dean and Chapter ſhall not take advantage of the condition, but the heir [i].

[i] 29 H. 8. Dy. fo. 33.

Leſſee

Leſſee for 40 years of divers lands deviſeth his term to his eldeſt daughter and her iſſues, the remainder to the youngeſt daughter, &c. the eldeſt daughter took husband and died without iſſue; her husband ſold the term: *per Curiam* the ſale is good, and that the younger daughter had no remedy for it; becauſe the remainder was void, it being of a term [k].

[k] 28 H. 8. Dy. fo. 7.

A leaſe was made for 41 years to W. C. if he ſhould ſo long live, and if he ſhould die within the ſaid term, that then E. his wife ſhould have it for the reſidue of the ſaid years: *per Curiam*, the limitation to E. is void, for that the term ended by the death of W. C. and then there was no reſidue to remain to the wife [l].

[l] 9 Eliz. Dy. fo. 253. Pl. Com. fol. 190.

A. having divers daughters and ſons granteth divers rents or annuities unto them, maketh his will, and deviſeth his land to his eldeſt ſon, paying the ſeveral annuities and legacies to every one of his children; and if his heir doth not pay them, then his Executors to have the land, &c. Adjudged, although it is ſaid [*heir*] in the ſingular number, yet the heir of the heir ought to pay it: for [*heir*] is *nomen collectivum* [m].

[m] H. 2 Jac. rot. 360. B. R. *Mollineux* verſ. *Mollineux*. Crok. par. 2. fol. 145.

Leſſee for 30 years of a parcell of land lets it for 28 years rendring 34 li. rent *per annum*, and after deviſeth 28 li. parcell of that rent to his three ſons ſeverally, to every of them a third part; the one of them brings his action of debt for his part of the rent: and adjudged that the Action will not lie; and that the rent was apportionable, and that the tenant is chargeable without attornment, by the deviſe, to every one of the deviſees for his part by action of debt; otherwiſe he is without remedy, for no diſtreſs lieth [n].

[n] T. 40 Eliz. *Ards* verſ. *Watkin*. Crok. part 3. 637. 651. Moores rep. fol. 549. n. 737.

A man poſſeſſed of a leaſe for 20 years of certain lands deviſeth it to his wife (whom he maketh Executrix) for 6 years, and after the 6 years to *John* his ſon, who was beyond ſea, and if he doth not return within the 6 years, then to *Wil.* his ſon till *John* return; the wife enters, and claims *virtute legationis*; *William* within the 6 years maketh his Executor, and dieth; the 6 years expire, and *John* doth not return: adjudged that the Executor of *William* ſhall have the term [o]. And it is not a poſſibility, but the intereſt of the term after the 6 years expired. And though it ſhould be accounted to be a poſſibility in the teſtator, yet foraſmuch as it is ſuch a poſſibility, that the term might have veſted in him, if he had lived untill after the 6 years expired, the wife by her entry having agreed to that legacy, the reſidue of the term might have veſted in him without any other ceremony: therefore it might well go to his Executrix; and a term certain being limited to one, and after that it ſhall go to another, is not a contingent eſtate, but an intereſt. Vid. lib. 3. fol. 16. *Boraſtons* Caſe. Pl. Com. fol. 519. *Weldens* Caſe. lib. 10. fol. 51. *Lampets* Caſe.

[o] T. 15 Jac. rot. 615. B. R. *Sheriff* verſus *Wrotham*. Crok. part 2. fol. 509.

Lib. 3. fo. 16. *Boraſtons* caſ. Pl. Com. fo. 519. *Weldens* caſ. lib. 10. fol. 51. *Lampets* caſe.

A man having two ſons and a daughter, deviſeth his land to his wife for 10 years, the remainder to the youngeſt ſon and his heirs, and if either of the two ſons die without iſſue, &c. the remainder to the daughter and heir heirs; the younger ſon dieth in the life-time of the father, and after the father dieth: *per Curiam* it is a good remainder to the daughter, being by deviſe, though the particular eſtate fail.

But it ſeems the elder ſon ſhall firſt have an eſtate tail, by the intent of the deviſor p.

p Dy. 122.

A man deviſes his land to A. and B. and the heirs of either of their two bodies, and for default of ſuch iſſue the remainder to the right heirs of the deviſor; after the deviſor's death one of the ſaid deviſees dieth without iſſue, the other deviſee hath iſſue and dieth: the iſſue ſhall have a moiety and no more; for it ſeemeth that this word [*either*] maketh ſeverall eſtates q.

q Dy. 326.

If an eſtate be given to husband and wife and the heirs of their two bodies, the remainder to the right heirs of the husband; he may deviſe that remainder to his wife r.

r 27 Aſſ. 50. Rolls Abridg. tit. deviſe, F.

One deviſed his land to J. S. from *Michaelmas* following for five years, the remainder to B. and his heirs; J. S. died before *Michaelmas*. The queſtion was, whether this was a good remainder, becauſe it could not enure inſtantly by his death; for it may not begin untill the particular eſtate, which was not to begin till after *Michaelmas*; and a free-hold cannot expect. But all the Court held, that it might expect; for in caſe of a deviſe, the free-hold in the mean time ſhall deſcend to the heir and veſt in him: therefore it was adjudged accordingly, and that the remainder was good †.

† M. 43 & 44 Eliz. B. R. *Pays* caſ. Crook. part 3. fol. 879.

C. deviſeth his houſe in S. to A. his Coſin in Fee-ſimple, and after her death to W. her ſon, which W. was heir apparent to A. it was adjudged that A. is but tenant for life, the remainder to W. for life, the remainder to A. in Fee t.

t 19 Eliz. *Chuks* caſ. Dy. fol. 357.

D. makes his will in this manner; I will and deviſe that A. and B. my feoffees ſhall ſtand ſeiſed of my land to the uſe of *Jo. Callis* during his life, with remainders over; and he had no feoffees: and adjudged a good deviſe to *Jo. Callis*, with the remainders over, by reaſon of the intention of the teſtator v.

v 2 Car. *Baffield* verſ. Eyboro. Pophams rep. fol. 188.

L. maketh a feoffment to his own uſe, and after deviſeth, that his feoffees ſhall be ſeiſed to the uſe of his daughter A. who in truth was a baſtard: it is a good deviſe of the lands by reaſon of the intention; for by no poſſibility they can be ſeiſed to his uſe; and if he deviſeth that his feoffees ſhall make a gift in tail, it is a good deviſe of the land x.

x P. 15 Eliz. *Lingens* caſ. Dy. fol. 323.

A man having iſſue three ſons, A. B. C. deviſed his lands to B. his ſecond ſon and his heirs *in perpetuum*, paying to his brother C. 20 li. at his age of 21 years; and if B. died without iſſue living A. then A. his brother ſhould have thoſe lands, to him, his heirs and aſſigns for ever, paying the ſaid ſum as B. ſhould have paid. The queſtion was, whether B. had an eſtate in Fee or in tail. It was adjudged, that it was not an eſtate tail in B. but a Fee; for it is deviſed to him and his heirs *in perpetuum*, and alſo paying 20 li. and the clauſe [*if he died without iſſue*] is not abſolute, whenſoever he died without iſſue, but it is with a contingency, if he died without iſſue, living A. for he might ſurvive A. or have iſſue at the time of his death living A. 2. It was adjudged, it was a good limitation of the

the fee to A. by way of contingency, not by way of immediate remainder [y].

[y] M. 18 Jac. B. R. *Pell* and *Browns* caſ. Crook part 2. fol. 590. 19 H. 6. 74. 12 E. 3. 8. Cok. lib. 7. fol. 41. *Berisfords* caſ. lib. 10. fol. 50. *Lampets* caſe.

If land be deviſed to A. for life, the remainder to B. for life, the remainder to J. S. in Fee; in this caſe, if B. be a perſon incapable of a deviſe, then he in remainder in Fee ſhall take preſently after the firſt eſtate for life ended: and if the deviſe be to a perſon for life who is uncapable to take, the remainder to J. S. in Fee, then ſhall J. S. take preſently [z].

[z] Perk. S. 576. 567.

R. K. was ſeiſed in Fee of a meſuage, and of 2 acres of land in C. N. and of 2 acres of land in R. and uſed and occupied the ſaid 2 acres of meadow being 4 miles diſtant from the ſaid houſe together with his lands in C. N. made his will in writing, and deviſed his houſe *cum omnibus & ſingulis pertinentiis adinde vel aliquo modo ſpectantibus Tho. K. filio ſuo, & hæredibus ſuis in perpetuum, & pro defectu hæredum predict. Tho. K.* to *Anne Keene* daughter of the ſaid R. K. and to her heirs for ever; and for default of the heirs of the ſaid A. K. *tunc predictum meſuagium cum pertinentiis Jo. K. conſanguineo ſuo, & hæredibus ſuis in perpetuum:* here R. K. and T. K. died without iſſue. The queſtion was, whether by the deviſe of R. K. an eſtate tail in the meſuage and lands paſſed to T. K. or a fee-ſimple, and ſo the deviſe to A. K. void. It was agreed, that if the remainder had been limited to a ſtranger, the firſt eſtate had been a fee-ſimple, and the remainder void, as Dy. 19 H. 8. and 29 H. 8. 33. fol. 333. becauſe no intent appears to make it an eſtate tail, but a fee-ſimple: but here where it is limited to the brother and his heirs, and if he die without heir, to his ſiſter, who is his heir, to whom he intended it ſhould go, thoſe words ſhew what heirs he intended, *viz.* heirs of his body. But *Richardſon*, *Hutton* and *Harvey* conceived it to be a fee-ſimple, and no entail, and the remainder to be void. But *Yelverton* and *Croke* held that it was an entail in T. K. and the remainder to A. K. and her heirs in Fee. 2. By the deviſe of R. K. of the meſuage *cum pertinentiis* the 2 acres of meadow did not paſs, becauſe by the words *cum pertinentiis* land paſſeth not, but onely ſuch things as may be properly pertaining: otherwiſe it is, if it had been *cum terris pertinentibus*, then that which was uſed to it would have paſſed [a].

[a] T. 22 Jac. & Hil. 1 Car. rot. 1876. *Hearn* verſus *Allen.* Crook part 1. fol. 5[illegible]

A. deviſeth land to his wife for life, the remainder to his three ſons equally to be divided: this land ſhall not be aſſets, becauſe the eldeſt ſon is in by purchace, and not by diſcent, and that for the benefit of the ſurvivor. H. 29 Eliz. rot. 33. inter *Bean* & *Eaton* [b].

[b] H. 29 Eliz. rot. 33. inter *Bean* & *Eaton.*

A man deviſeth his lands to his daughter and heir, being a feme covert, and to the heirs of the body of the woman, the reverſion over in Fee, and dieth; the husband refuſeth to take by the deviſe, he in remainder entreth: he ſhall retain the lands during the lives of the huſband and wife, but after their deceaſe the iſſue of the wife may enter upon him [c].

[c] Dy. Reading Sur l' Stat. *de Volunt.* § 22. S. 3.

A man ſeiſed of land in Fee hath iſſue two ſons and a daughter, the father deviſeth the land to his wife for term of life, the remainder *propinquioribus de ſanguine puerorum* of the deviſor; the daughter hath iſſue, and dieth: the iſſue of the daughter ſhall have this remainder; and although the ſons have iſſue after, yet their iſſue ſhall not have it [d].

[d] Dy. Reading Sur l' Stat. *de Volunt.* Sect. 3. § 23.

A man having two ſons and a daughter, who hath two daughters, deviſeth his land to a ſtranger for life, the remainder to his ſecond ſon for life, the remainder in Fee to the next of bloud to his ſon: in this caſe, if the eldeſt ſon die without iſſue, the daughter and her daughters ſhall have the land *.

* Fitz. tit. Deviſe, pl. 9. Perk. S. 5. 8.

A man ſeiſed of lands in Fee-ſimple ſowed the ſame, and afterwards deviſed the land to J. D. It was adjudged that the deviſee ſhould have the corn, and not the Executors of the deviſor [f].

[f] M. 20 Jac. C. B. *Spencers* caſ. Winch rep. fol. 51.

And it was then ſaid, that it was adjudged 18 Eliz. in *Allens* caſe, that where a man deviſed land (which was ſown) for life, the remainder in Fee, and the deviſee for life died before ſeverance, he in the remainder ſhould have it. And it was ſaid by *Winch* Juſtice, that if a man deviſeth land, and afterwards ſows it, and after dies, that in that caſe it was adjudged, that the deviſee ſhould have the crop, and not the Executor of the deviſor [g].

[g] Ibidem.

§ V. Of the deviſe of Goods and Chattels.

1. *All manner of Goods and Chattels may be deviſed by Will, certain caſes excepted.*
2. *The rule of the deviſe of Lands, contrary to the rule of diſpoſing of goods.*

COncerning the ſecond kind of things deviſable by Teſtament, namely Goods and Chattels, this may be delivered for a rule; That (1) all manner of goods and chattels may be bequeathed or deviſed by Will or Teſtament [a], certain caſes onely excepted [b].

[a] L. cætera ff. de leg. II. § tam corporales. Inſtit. de legat. & ibid. DD. Lindw. in c. ſtatutum de teſta. lib. 3. provincial. conſtitut. Cant. Perkins tit. deviſe, c. 8. fol. 99. [b] De quibus § prox.

Which rule is (2) clean contrary to the former of the deviſe of Lands, Tenements and Hereditaments; for they cannot be deviſed, ſaving where ſome cuſtome or ſtatute hath gained liberty of bequeathing or deviſing of the ſame [c]: but here, in ſtead of the Negative rule, is ſet down the Affirmative; the exceptions of which rule are proſecuted in the next Paragraph.

[c] Ut ſupra ead. part. §§ 2, 3, 4.

In the mean time, before we proceed any farther, it ſhall not be amiſs to recite ſome few ampliations, ſhewing how the † ſaid Affirmative rule is extended. The firſt ampliation is, That not onely that thing may be deviſed or bequeathed by the Teſtator which is truly extant, or hath an apparent being, at the time of the making

† L. quod in rerum. ff. de legat. 1. Inſtit. tit. de legat. § ea quoque res.

king of the Will, or death of the Teſtator; but that thing alſo which is not *in rerum natura* whilſt the Teſtator liveth. Therefore it is lawfull for the Teſtator, to bequeath the corn which ſhall be ſown or grow in ſuch a ſoil after his death, or the Lambs which ſhall come of his flock of ſheep the next year, depaſturing in ſuch a field. But if there ſhall be no ſuch corn growing in that ſoil, nor any Lambs ariſing out of that flock, then the Legacy is deſtitute of effect, becauſe no ſuch thing is extant at all as was bequeathed*. But if the Teſtator deviſe a certain quantity of grain, or number of Lambs, as for the purpoſe, twenty quarters of Corn, or twenty Lambs, and doth will and deviſe, that the ſame ſhall be paid out of the Corn which ſhall grow in ſuch a field, or ariſe of his ſheep depaſturing in ſuch a ground: though not ſo much, or no Corn at all there grow, or not any, or not ſo many Lambs there ariſe; yet nevertheleſſe the Executor is compellable by Law to pay the whole Legacies entirely †: becauſe the mention of the ſoil, and of the flock, was rather by way of demonſtration, then by way of condition; rather ſhewing how or by what means the ſaid Legacy might be paid, then whether it ſhould be paid at all yea or no. Which intention of the Teſtator is collected by this, that the quantity is not joyned to the ſubſtance of the Legacy, but to the payment thereof onely; otherwiſe the Legacy were void, as hereafter more fully is declared. Howbeit in contracts and grants among the living, it ſeemeth that the Laws of this Realm do not acknowledge any ſuch diſtinction, whether the quantity of the thing granted be joined to the ſubſtance, or to the payment thereof, but that it is due in both caſes: ſo that if a man grant to A. B. an annuity of ten pounds, to receive out of his coffers, though he have neither coffers, nor money in them, nevertheleſs his perſon ſhall be charged with the annuity; becauſe the grant it ſelf induceth a charge from the grantor. So likewiſe if a man grant an annuity of ten pounds out of his Land in *Dale*, although he have no Land in *Dale*, yet is not the grant thereof void, but his perſon ſhall be charged therewith ‖.

* L. Cum ita. § ſpecies. ff. de lega. 1. L. ſi ſic. § 1. eod. tit.

† d. L. ſi ſic. § 1. de leg. 1. L. quid teſtamento, in prin. ff. de leg. 1. & 1. Paulo Callimacho. § Julianus Severus. § de leg. 3. & L. Lucius. ff. de alim. leg.

‖ Fulbeck 2. part. parallel. tit. de conditionibus. fol. 64. poſt. Fitz. & alios.

The ſecond ampliation is, That albeit by deed of gift, made in the life-time of any perſon to another, of all his goods and chattels, debts or things in action do not paſs: yet if the Teſtator by his laſt Will and Teſtament do give or bequeath to another any debt due unto him, or a thing in action belonging unto him, the Legacy is good, and effectuall in the Law*, and may be recovered in this manner. That is to ſay, if the Teſtator do make the Legatary Executor of that particular debt or thing in action bequeathed, then the Legatary as Executor thereof may commence ſuit in his own name, and recover the ſame to his own uſe, againſt him by whom it was due. But if the Teſtator do not make the Legatary Executor of the debt, or thing in action bequeathed, then his remedy lieth in the Eccleſiaſticall Court, where he may convent the Executor, and compel him either to ſue for that debt in a Court competent, and

* Inſtit. tit. de lega. § Tam autem. l. cætera, in prin. ff. de lega. 1. cum ſimil.

and upon the recovery and payment thereof, to pay it over to the Executor; or elſe to make a Letter of Atturney to the Legatary for the recovery of the debt, or thing in action bequeathed, in the name of the Executor, to the uſe of the Legatary *. Howbeit if the Teſtator himſelf, after the making of his Will, exact the debt bequeathed, then is the Legacy void †. Or if the husband make his Will of a debt, or other thing in action, which he hath in right of his Wife, the Legacy is void: and ſo it is if he diſpoſe of any chattell reall, or leaſe which he holdeth in right of his Wife: for after the Husband's death, they return to the Wife ‖.

* d. § Tam autem. Inſtit. de lega.

† d. § Tam autem.

‖ Abridgment of caſes printed Anno Dom. 1599. f. 179. n. 4. Doct. & Stud. cap. 7.

The third ampliation is, That albeit the Teſtator have no ſuch thing of his own as is bequeathed, yet nevertheleſs the Legacy is good in Law: therefore if the Teſtator do bequeath a Horſe or a yoke of Oxen, the Legacy is good in Law, though the Teſtator have neither Horſe nor Oxe of his own *. But who ſhall make choice in this caſe of the thing ſo bequeathed, is a queſtion not to be neglected. And the ſolution is this: That if the words of the deviſe be directed to the Legatary, as if the Teſtator ſhall thus ſay, I will that *A. B.* ſhall have a Horſe, the choice doth belong to the Legatary; but if the words be directed to the Executor, as if the Teſtator ſhall thus ſay, I will that my Executor give to *A. B.* a Horſe, the election doth belong to the Executor †. Provided nevertheleſs, that to whomſoever the election doth belong, whether to the Legatary or to the Executor, they muſt not be unreaſonable in their election, but frame themſelves to the meaning of the Teſtator, (as elſewere I have delivered ‖:) otherwiſe the Legatary might make choice of the beſt Horſe, and the Executor of the worſt in the Country, contrary to the meaning of the deceaſed. To this purpoſe it is well ſaid, though he were no Lawyer that ſaid it,

* L. legato generaliter. ff. de lega. 1. ac Bar. Paul. de Caſtr. ac omnes DD. ibid.

† DD. in d. l. legato. Graſſ. li. com. opinionum, § legatum, q. 62. Covar. in c. Judicante de teſta. ex. n. 3.

‖ Inf. part. 7. § 10. n. 5, &c. uſque ad finem.

Eſt modus in rebus, ſunt certi denique fines,
Quos ultra citraque nequit conſiſtere rectum.

A fourth ampliation might be added out of the Civill Law, That it is lawful for the Teſtator to bequeath, not onely his own things or goods, but alſo another man's, which the Heir muſt buy, or elſe pay the value thereof, if the Owner will not ſell them *. But becauſe the Civill Law in this point is not onely contrary to the Laws Eccleſiaſticall of this Realm †, but alſo to the Laws temporall ‖; in ſtead of an ampliation, I have placed it as a limitation or exception to this affirmative rule.

* § non ſolum. Inſtit. de lega. l. alienum. c. com. d. legat.

† Cap. filius de teſta. ex. & ib. Covar. in fin. Panor. in rep. c. cum eſſes. eod. tit. n. 18. Bar. tract. de dif. inter Jus can. & civil. n. 86.

‖ Plowden in caſ. inter *Bransby* & *Grantham*. Doct. & Stud. lib. 2. cap. ult. prope finem.

§ VI.

§ VI. *Divers kinds of Goods not deviſable by Will.*

1. *Goods which a man hath joyntly with another cannot be deviſed by Will.*
2. *What if the other joynt-tenant be made Executor? whether is the bequeſt good?*
3. *Goods which a man hath as Adminiſtrator cannot be given by Will.*
4. *Every Adminiſtrator accountable to the Ordinary.*
5. *Difference betwixt the Executor of an Executor, and the Executor of an Adminiſtrator.*
6. *Goods of the Realm, that is to ſay, of the ancient Crown and Jewels, cannot be given by Will.*
7. *Goods belonging to a Church or Hoſpitall cannot be deviſed.*
8. *Goods belonging to a City, Borough, or Comminalty, cannot be deviſed.*
9. *Church-goods cannot be deviſed.*
10. *Things which deſcend to the Heir, and not to the Executor, are not deviſable by will.*
11. *Whether the corn growing upon the ground, whereof a man is ſeiſed in right of his wife, be deviſable.*
12. *Whether corn on the ground be deviſable by the leſſee, the leſſor being ſeiſed in right of his wife.*
13. *Corn growing deviſable by the Tenant, by the curteſie of* England.
14. *Corn growing deviſable by the Tenant in Dower.*
15. *Whether corn growing on Land morgaged be deviſable.*
16. *Whether corn growing may be deviſed by the Teſtator's Daughter, where a Son and Heir is afterwards born, or wherein the mother doth recover her Dower.*
17. *The Teſtator cannot bequeath that which is another man's.*

FIrſt, (1) a man cannot give or bequeath by Will any of thoſe goods or chattels which he hath joyntly with another: for if he ſhould bequeath his portion thereof to a third perſon, this bequeſt is void by the Laws of this Realm [a]; and the ſurvivor which had thoſe goods or chattels joyntly with another, ſhall have that portion ſo bequeathed, notwithſtanding the ſaid Will [b]. Inſomuch that (2) if the Teſtator make the other joynt-tenant his Executor, againſt the which Executor an action is commenced in the Eccleſiaſticall Court in a cauſe of Legacy: nevertheleſs the Executor is not to be adjudged to poſſeſs the ſaid goods as Executor, or by right of the Will, but by the Title and right of the ſurvivor [c]; and ſo the Executor is to be diſmiſſed, and the Will in that reſpect to be judged void [d].

[a] Perkins tit. deviſe, fol. 101. Doct. & Stud. l. 1. c. 6. licet jus civile contrarium dicat. L. cum alienum. C. de legatis.

[b] Hoc verum jure regni noſtri Angliæ. Doct. & Stud. lib. 2. c. 25. Secus ju e civili, ut late per Olden. de action. claſſ. 4. action. pro ſocio. [c] Doct. & Stud. l. 2. c. 25. [d] Vide ſupra eadem part. § 3. n. 8.

Secondly, (3) an Adminiſtrator cannot make a Teſtament of thoſe goods which he hath as Adminiſtrator, to any perſon dying inteſtate *; becauſe he hath not any ſuch goods to his own proper uſe [f], but ought therewithall to pay the debts and Legacies of the dead perſon, and to diſtribute the reſt (if any thing do remain) in godly and charitable uſes [g]. And for that cauſe (4) every Adminiſtrator is accountable to the Ordinary for ſuch diſtribution of the goods of the deceaſed, committed to his Adminiſtration [h]. And albeit (5) an Executor of an Executor may adminiſter the goods of the former Teſtator [i]: yet the Executor of an Adminiſtrator cannot adminiſter the goods of the former deceaſed, but a new adminiſtration is to be committed by the Ordinary of all the goods unadminiſtred by the late Adminiſtrator, as if he had alſo died inteſtate, any Teſtament or aſſignation of an Executor by him notwithſtanding [k]. By this then it appeareth, that the authority of an Executor is greater then of an Adminiſtrator: for an Executor may appoint an Executor to the firſt Teſtator, ſo cannot an Adminiſtrator. Howbeit an Executor cannot give away the goods of the Teſtator in his Will by Legacies, no more then an Adminiſtrator [l]; for thoſe goods are not the proper goods of the Executor, but are to be imployed for the behoof of the Teſtator [m]: and in that reſpect alſo is the Executor accountable to the Ordinary, as well as the Adminiſtrator [n]. I mean of a bare and meer Executor, of whoſe diligence the Teſtator made ſpeciall choice, to whom nothing is bequeathed in the ſaid Teſtament. But of the profits and fruits which happen and ariſe out of thoſe goods which belong to any as Executor, he may make his Teſtament, though not of the goods themſelves, as hath been afore ſaid *.

Thirdly, by the opinion of divers Juſtices of this Realm, and Doctors of the Canon and Civill Law, (6) the goods of this Realm, that is to ſay, of the ancient Crown and Jewels, cannot be diſpoſed by Will [o], as is afore ſaid [p].

Fourthly, (7) thoſe things which belong to any Colledge or Hoſpitall cannot be deviſed by the Teſtament or laſt Will of the Maſter of the ſaid Colledge or Hoſpitall [q]. (8) The ſame may be ſaid of a Mayor of any City or Borough, for he cannot by his Teſtament bequeath any thing belonging to the City, Borough or Comminalty [r]; no more then a Maſter of a Colledge or Hoſpitall, ſuch things as he hath in right of the Colledge or Hoſpitall †.

Fifthly, (9) the goods of the Church cannot be deviſed by Teſtament [s]: but the Corn growing upon the Glebe [v], and certain other goods, may be bequeathed, as hath been before declared [x].

Sixthly, (10) thoſe things which after the death of the Teſtator deſcend to the Heir of the deceaſed, and not to his Executor, cannot be deviſed by Teſtament [y]; except in ſuch caſes where it is lawfull to deviſe Lands, Tenements, or Hereditaments. And therefore if a man ſeiſed of Lands in fee, or fee tail, bequeath his Trees growing upon the ſaid Land at the time of his death, this deviſe is not good, except as before: but if he deviſe the Corn growing upon the ſame Land at the

* Brook tit. adminiſtrator, n. 7. Fitzherb. eod tit. n. 3.

[f] Plowd. in caſ. inter *Bransby* & *Grantham*, fol. 525, 526.

[g] c. ita quorundam. de teſtam. lib. 3. provincial. conſt. Cant. ſtat. Ed. 3. an. 31. c. 11.

[h] Stat. Ed. 3. an. 31. c. 11.

[i] Stat. Ed. 3. an. 31. c. 25.

[k] Brook Abridg. tit. adminiſt. p. 7. Principall grounds, fol. 61.

[l] Plowd. de caſ. inter *Bransby* & *Granth.* n.

[m] c. ſtat. de teſta. l. 3. provincial. conſtit. Cant.

[n] Eod c. ſtatutum.

* Sup. part. 2. § 9.

[o] Fitzherb. Abridg. tit. exec. n. 108.

[p] Supra part. 2. § ult.

[q] Perkins tit. deviſe, fol. 96. Doct. & Stud. lib. 2. c. 39.

[r] Perkins tit. deviſe, fol. 96. § non ſolum. Inſt. de lega. ver. ſed ſi.

† Perkins ubi ſupra.

[s] c. 1 de teſtam. extr.

[v] Stat. H. 8. an. 28. c. 11.

[x] Supr. part 2. § penult.

[y] Perkins tit. deviſe, à quo ſequentes caſus mutuatus ſum.

at the time of his death, from the Heir to ſome other perſon, this deviſe is good, albeit the Land whereupon it groweth be not deviſable. The reaſon of the difference is, becauſe the Trees are parcell of the freehold, and deſcend together with the Land to the Heir, and not the Executor: but it is not ſo of Corn, for the ſame ſhall goe to the Executor as parcell of the Teſtator's goods. And therefore (11) if a man be ſeiſed of Lands in the right of his Wife, and ſow the Land, and deviſe the Corn growing upon the ſame Land, and die before the Corn be reaped; in this caſe the Legatary ſhall have the Corn, and not the Wife: but it is otherwiſe of graſs and herbs not ſeparated from the ground at the time of the death of the Teſtator. (12) If a man ſeiſed in fee in right of his Wife do let the ſame Lands for years to a ſtranger, and the leſſee ſoweth the ground, and afterwards the Wife dieth, the Corn not being ripe: in this caſe the leſſee may deviſe the ſame Corn, notwithſtanding his eſtate be determined. So is it, (13) if he that is Tenant by curteſy of *England* of Lands, Tenements or Hereditaments for his life, let the ſame Land to another for years, and the leſſor die within the term of thoſe years: in this caſe the leſſee may deviſe the Corn which ſhall be growing upon the ſame Land, not ripe at the time of the death of the Teſtator. Likewiſe (14) if the Tenant in Dower ſow thoſe Lands which he hath in Dower, and make his Executors, and after dieth, the Corn not ſeparated; there the Executors ſhall have the Corn, notwithſtanding the ſame be not ſeeded. And ſo the Tenant in Dower may deviſe the Corn growing upon that Land which ſhe holdeth in Dower, at the time of her death. But it is not alwaies lawfull for a man or a woman to deviſe the Corn by them ſown: for (15) if a man ſeiſed of Land in fee do infeoffe a ſtranger in mortgate upon payment and not payment made on the party of the feoffor at a certain day, and the feoffee ſow the land, and the feoffor pay the money at the day appointed, and enter: in this caſe it is thought that the feoffee cannot deviſe the Corn growing upon the ſaid Land. Likewiſe if he that is Tenant in tail of certain Land do let the ſame land for term of life, and the leſſee do ſow the ſame Land, and the Tenant in tail die, and the iſſue do recover the ſame in formedon in the diſcent before the Corn be ſeparated: it is thought in this caſe that the iſſue in tail may bequeath the ſame by his Teſtament. Moreover (16) if a man ſeiſed in fee have iſſue a Daughter, and die, his Wife being great with Child, and the Daughter enter and ſow the ground, and afterward before the Corn be ſevered the wife is delivered of a Son, and thereupon his next friend do enter for him; yet the Daughter may deviſe the Corn growing upon the ſame Land: but if after the ſowing of the Corn, and before the birth of the Son, the Mother hath recovered her Dower againſt her Daughter, and the ſame Land that is ſown is allotted or aſſigned unto her by the Sheriff for her Dower, in allowance of other Lands; there the Mother may deviſe the Corn growing upon the ſaid Land, and not her Daughter.

Seventhly, foraſmuch as thoſe things which after the death of the Teſtator deſcend to the Heir, and not to his Executor, are not deviſa-

ble by his Will, except in ſuch caſes where Lands, Tenements and Hereditaments be deviſable: therefore thoſe things which be affixed unto the free-hold are no more deviſable then the free-hold it ſelf; as the windows, with the tables dormant, and benches affixed thereunto, or mortiſed in the earth. Inſomuch that if a Tenant for years do, upon his own proper coſts and charges, ſet Glaſs in the windows of the houſe which he holdeth of another, the ſame is thereby made parcell of the houſe or Tenement; and being parcell thereof, cannot be taken away, without danger of puniſhment for waſt; and conſequently not deviſable by his laſt Will and Teſtament. For without the glaſs the houſe is not perfect, as without the which, the ſame lying open to tempeſts and rain, the Timber thereof is ſubject to putrefaction and waſt: and therefore the Glaſs annexed unto the windows of the houſe, either by nails or otherwiſe, together with the Furnaces and Ovens, ſet in Mortar or Stone, ſhall accrue to the Heir of the Landlord, and not to the Executors of the Tenant *. The like may be reſolved of the Wainſcot annexed unto the houſe, either by the leſſor or by the leſſee; for being affixed, it is parcell of the houſe, and ſo not otherwiſe deviſable then the houſe it ſelf whereunto it is affixed. Neither is there any difference, whether the ſame be affixed by nails, great or little, or by ſcrews or irons let in through the poſts or walls of the houſe: for being affixed to the free-hold, by theſe or by any other waies or means, the Wainſcot cannot be removed by the Tenant, which if he do, he is puniſhable in an action of waſt; and therefore he cannot make his Teſtament thereof †.

* D. Coke lib. 4. in *Herlakendens* Caſe. Kelway, Reſpon. fo. 88. n. 3.

† D. Coke in Caſe *Herlakenden*, ubi ſup.

Finally, (17) whereas by the Civill Law it was lawfull for the Teſtator to bequeath not onely his own things, but another man's alſo [a]; inſomuch that the Executor was compellable to redeem the ſame thing, and deliver it to the Legatary; or if the owner would not ſell it, then to pay the juſt value thereof to the ſame Legatary [b]; unleſs the Teſtator were ignorant that the ſame thing did belong to another, and did ſuppoſe it to be his own; in which caſe the Legacy is void, ſo that the Executor is neither bound to buy the thing, nor to pay the value thereof [c], becauſe peradventure if the teſtator had known that it had been another man's, he would not have bequeathed the ſame [d]: yet nevertheleſs both by the Laws Eccleſiaſticall *, and alſo by the Laws of this Realm [f], no man can bequeath or deviſe any thing by his Teſtament or laſt Will, ſaving onely that which is his own, and that which he hath to his proper uſe [g]; and if he do bequeath any other man's, the bequeſt is void, ſo that the Executor is neither bound to redeem the thing for the Legatary, nor to pay the value thereof [h]; and that without diſtinction, whether the Teſtator did know, or not know, whether the thing bequeathed were his own, or another man's [i]. But what if the Teſtator do bequeath ſomething which at the time of the making of the Teſtament is not his, but the Teſtator afterwards doth

[a] § Non ſolum. Inſtit. de lega. L. cum alienum. C. de lega.
[b] Eod. § non ſolum. L. non dubium. ff. de lega. 3.
[c] d. § non ſolum. L. ſi unum. § ſi rem. ff. de lega. 2.
[d] d. § non ſolum. Inſtit. de lega.
* c. filius. de teſta. extra. & ibi Covar. in fin. Panor. in repe. c. cum eſſes. eod. tit. n. 18. Bar. tract. de differentiis inter jus can. & civil. n. 86.
[f] Plowden in caſ. inter *Bransby* & *Grantham*. Huc etiam pertinent quæ ſuperius ſcribuntur in initio hujus §. de coemptore ſeu condomino diſponente. [g] Plowd. ubi ſupra. [h] Covar. Panor. Sichard. ubi ſupra. [i] Si enim ignoraſſet rem eſſe alienam, tunc vel civili jure non valet legatum. § nonſolum. Inſtit. de lega.

buy

buy the ſame? whether is this thing due, or recoverable by the Legatary, yea or nay? By the Civill Law it is not due [k], but in ſome few caſes [l]. By the laws of this Realm it ſeemeth that we are to diſtinguiſh, whether ſome ſpeciall thing be deviſed or not. For if a ſpeciall or certain thing be deviſed, as if the Teſtator do bequeath the Manor of *Dale*, then albeit the Teſtator had no ſuch Manor when the will was made, yet by the purchace made afterwards, the Teſtator is preſumed to have had this meaning from the beginning, to purchaſe the ſame for the benefit of the Legatary; and ſo the deviſe is good [m]. But if the Legacy be not ſpeciall, but generall, as if the Teſtator do bequeath all his lands; then the Teſtator having ſome lands at the time of making the Teſtament, and purchaſing other lands afterwards, theſe lands purchaſed after the making of the Teſtament ſhall not paſs [n]. But howſoever the Laws of this Realm have determined concerning the deviſe of Lands, Tenements and Hereditaments, purchaſed after the making of the Teſtament: yet concerning Goods, if the Teſtator do bequeath any ſuch thing in generall terms, as a horſe or an oxe, although the Teſtator have neither horſe nor oxe at the time of his Teſtament made, neither yet at the time of his death, the Legacy is not therefore void [o]; but the Executor is bound to deliver an horſe, or an oxe: as elſewhere is confirmed; where alſo is ſhewed to whom the choice belongeth in this caſe, and what manner thing is to be delivered [p].

[k] L. 1. ff. de regul. Canon.

[l] Repertor. Borrach. verb. regula Caton.

[m] Plowd. in caſ. inter *Bret* & *Rygden*, fol. 344.

[n] Plowd. ubi ſupra.

[o] Bar. Paul. de Caſt. & alii in L. legat. generaliter. de leg. 1. ff.

[p] Infra part. 7. § 1.

Deviſes of Leaſes and Chattels real when good, when not, and to whom.

W. H. poſſeſſed of a long term of years deviſeth that *W. Heath* his ſon and his aſſigns ſhould have the ſaid Tenements and reverſion of them, and all his title and intereſt in the ſaid tenements, for all the other of the ſaid 76 years which ſhould be unexpired at the time of his wife's death; Provided, that if the ſaid *W.* died without iſſue living at the time of his death, that *Tho.* his ſon ſhould have it for all the reſidue of the 76 years unexpired from the death of his Wife and of *W.* without iſſue; and if he died without iſſue, then to his daughters: *W.* aliens, and dies without iſſue. The queſtion was, whether this alienation ſhall bind *T. H.* or that he may avoid it. Adjudged that this alienation ſhall bind *T. H.* for when he limited it to *W.* and his aſſigns, all the eſtate was veſted in him, and he had an abſolute power to diſpoſe thereof: and then the Proviſo thereto added is void to reſtrain the alienation; and the limitation to the heirs of the body and the Proviſo are all one. (*a*)

L. deviſed a term of years to A. and the heirs of his body, and if he die without iſſue, that it ſhall remain to another: it was adjudged a void remainder, for he cannot limit a remainder upon a term after the death of another without iſſue; for ſuch an entail of a term is not allowa-

(*a*) H. 15 Jac. B. R. *Child* verſ. *Baylie*. Crook part 2. fo. 459. T. 3 Car. rot. 840. *Sanders* verſ. *Corniſh*. Crook part 1. fo. 230.

allowable in law, for the miſchief which otherwiſe would enſue, if there ſhould be ſuch a perpetuity of a term. *(b)*

(b) 13 Jac. in the Exchequer chamber *Lewknors* caſ.

W. C. poſſeſſed of a term for years deviſed it to his wife for life, and afterwards that *Jo.* his ſon ſhould have the occupation thereof as long as he had iſſue, and if he died without iſſue unmarried, that J. his younger ſon ſhould have the occupation thereof as long as he had iſſue of his body; and if he died without iſſue unmarried, he deviſed the moiety to D. his daughter, the other moiety to R. and W. his Sons, and made his wife Executrix, and ſhe aſſented to the Legacy, and died; *Jo.* and *Jaſper* died without iſſue, unmarried: adjudged that R. and W. ſhould have a Moietie. And this caſe differs from the caſe of *Child* and *Baylie* aboveſaid: becauſe the limitation here is, [*if he die without iſſue unmarried,*] which is upon the matter, that if he dies within the term, for if he be not married, he cannot have iſſue; but in *Childs* caſe, he might have iſſue, and yet if that iſſue ſhould die without iſſue in his life-time, it ſhould remain, which the law will neither expect nor will ſuffer. *(c)*

(c) H. 9 Jac. rot. 889. *Rethorick* and *Chappell.*

Leſſee for years deviſeth his entire term to A. *Proviſo*, if he dieth living J. S. then the reliduе of the term ſhall remain to J. S. A. doth alien, and dieth: *per Hales & Mountague* J. S. is without remedy. *(d)*

(d) 6 E. 6. Dy. fo. 74.

Leſſee for 40 years of a houſe deviſeth the houſe to J. S. without limiting what eſtate he ſhall have: the deviſee ſhall have the entire term; for he cannot have it for life, at will, nor for a leſs term of years. *(e)*

(e) M. 14 Eliz. Dy. fo. 307. Anderſ. rep. n. 105.

A man made his will in this manner; *viz.* I have made a leaſe for 21 years to J. S. paying but 20 ſhil. rent: *per Curiam* it's a good leaſe by the will; for that word [*I have*] ſhall be taken in the preſent tenſe, as is the word [*Dedi*] in a deed of feoffment. *(f)*

(f) T. 3 Eliz. Moors rep. fo. 31. n. 101.

Leſſee for 60 years deviſed it in this manner; I give my wife and my Coſin my term for their lives, and after to ſuch perſons as ſhall remain in my houſe at N. at the time of their deceaſe; the wife ſurvives, and aſſigns the term to another; the heir of the leſſor enters, and lets for years, the term expires, the leſſee continues in poſſeſſion untill the death of the wife. The queſtion was, if this remainder of the term were good. 2 Juſtices held it was not, becauſe it was but a poſſibility, and there cannot be any remainder thereof; and no counſel can adviſe how ſuch a remainder by any act can be executed, and therefore it cannot be good in a will. But 2 other Juſtices to the contrary, and they relied upon the authorities of *Welden* and *Paramors* caſe, Pl. Com. *Sed adjournatur.* *(g)*

(g) M. 5 Jac. B. R. *Mallet* verſ. *Sackford.* Crook part 2. fo. 158.

A man poſſeſſed of a term for 40 years, by his Will deviſeth the ſame to J. S. after the death of his wife, and that the wife ſhould injoy it during her life, and that J. S. ſhould neither deviſe it nor ſell it, but leave it to deſcend to his Son; and in the mean time my will is, that my wife ſhall have the uſe thereof during her life, yielding 10 l. yearly to J. S. during her life at 2 feaſts; and made his wife Executrix, and died: the wife entred, and paid the 10 l. yearly according to the will. In this caſe 3 points are reſolved. 1. That J. S. doth not take by way of remainder,

but

but by way of executory deviſe; and a man may deviſe ſuch an eſtate by his will, which he cannot make by act executed: and the caſe is no more then this, that after the death of his wife J. S. ſhould have the reſidue of the term. 2. The deviſe is good being a chattell, which may veſt and deveſt at the pleaſure of the deviſor. 3. That there is no difference, when one deviſeth his land or his leaſe, or the uſe or occupation or the profits of his land. *(h)*

(*h*) C. lib. 8. fo. 96. *Matthew Mannings* caſe.

If one be poſſeſſed of a term for years, and deviſe the ſame to another and his heirs, or his heirs males; the Executors or Adminiſtrators, not the heirs of the deviſee, ſhall have it. *(i)*

(*i*) C. lib. 10. fo. 46. *Lampets* caſ. Perk. S. 558. 556.

C. deviſeth his land to A. B. and the heirs males of his body for the term of *99* years: by this deviſe A. B. hath but a leaſe for ſo many years, if the heirs males of his body ſhall ſo long continue, and for want of iſſue male the term of years ſhall determin: and in this caſe the Executor or Adminiſtrator, not the heirs males of A. B. ſhall have it after his death. *(k)*

(*k*) C. lib. 10. fo. 87. *Leonard Lovils* caſ.

If one deviſeth his land to his Executors for the payment of his debts, and untill his debts be paid; by this deviſe the Executors have a chattell and uncertain intereſt, and they and their executors ſhall hold it untill the debts be paid, and no longer. *(l)*

(*l*) Coke Inſt. part 1. 42.

W. ſeiſed of lands in Fee deviſed to his daughter and her heirs, when ſhe comes to the age of 18 years, and that his wife ſhould take the profits of his lands to her own uſe untill the daughter comes to the age of 18 years, and made his wife Executrix, and died; and it was provided, that the wife ſhould pay the old rent, and find the daughter at School untill ſhe could reade and write Engliſh: the wife enters, and proves the will, takes husband, and dies; the husband aſſigns this term; all the conditions were performed. Adjudged, 1. that it was a term for years in the wife, and after the death of the wife the husband ſhall have it. 2. This truſt of education was not a limitation perſonall, that the leaſe ſhould not be to the wife any longer then ſhe may educate her daughter; but it was agreed that any one may educate her, and find her at ſchool, and that there is no fault in the wife, for it's the act of God. *(m)*

(*m*) T. 17 Jac. C. B. *Blackburns* caſ. Hutton's rep. fo. 37. 36.

If one deviſeth his land unto his executors untill his ſon ſhall come unto the age of 21 years, the profits to be imployed towards the performance of his will, and when he ſhall come to that age, that then his ſon and his heirs ſhall have it; by this deviſe the Executors ſhall have it untill he be of 21 years of age, and if he die before that time, the Executors ſhall alſo have it, untill the time he ſhould have been 21 years of age, if he had lived ſo long; and the word [*ſhall*] in this caſe is taken for [*ſhould.*] *(n)*

(*n*) C. lib. 3. fo. 20. *Boraſtons* caſ.

If a man deviſe his land for ſo many years as his Executors ſhall name, it ſeemeth this deviſe is not good; but if it be for ſo many years as A. B. ſhall name, and he name a certain number of years in the Teſtator's life-time, this is a good deviſe. *(o)*

(*o*) Pl. Com. fo. 524.

H. being ſeiſed in Fee of lands and houſes in L. in the County of O. and alſo of houſes and lands in W. in the County of H. let the houſes and

and lands in W. in the County of H. to A. and afterwards deviſed all his Meſſ. and lands in L. in the County of O. and all his other Lands, meadows and paſtures in W. in the County of H. The Queſtion was, whether the houſes in W. in the County of H. paſſed by this deviſe. It was adjudged that by a deviſe of all his lands houſes may paſs; yet if the intent of the deviſor is otherwiſe, as in this caſe, they ſhall not paſs: for this particular deviſing of his Lands, Meadows, and Paſtures, exclude the general intendment of this word [*terra*,] and reſtrain it onely to arable Land, and exclude houſes and wood. *(p)*

(*p*) T. 36 Eliz. rot. 359. *Ewer* verſ. *Hayden.* Crook part 3. fo. 476. Moors rep. T. 36 Eliz. n. 491.

By a deviſe of *omnia bona*, a leaſe for years will paſs; if there be not ſome other circumſtance to guide the intent of the deviſor. *(q)*

(*q*) H. 36 Eliz. rot. 515. *Portman & Willis.* Moors rep. fo. 352. n. 474.

The Incumbent of a Church purchaſeth the advowſon in Fee, and deviſeth that his Executor ſhall preſent after his death, and deviſeth the inheritance to another in Fee: adjudged that it was a good deviſe of the next avoidance, though by his death the Church became void, and ſo a thing in action; yet it's good by reaſon of the intent of the deviſor. *(r)*

(*r*) P. 11 Jac. Sr. *Edward Pynchin* verſ. Doctor *Harris.* Crook part 2. fo. 371.

If a man hath lands in Fee and lands for years, and he deviſeth all his lands and tenements, the fee-ſimple Lands onely paſs, and not the leaſe for years. 2. If a man hath a leaſe for years, and no freehold, and deviſeth all his lands and tenements, the leaſe for years paſſeth. 3. If one deviſeth his land which he hath by leaſe to his Executor for life, the remainder over, there ought to be a ſpecial aſſent thereunto by the Executor as to a Legacy, otherwiſe it is not executed. *(s)*

(*s*) T. 7 Car. B. R. *Roſe* and *Bartlets* caſe. Crook part 1. fo. 292.

A man poſſeſſed of a term for divers years deviſed the profits thereof to one for life, and after his deceaſe to another for the reſidue of the years, and died; the firſt deviſee entred with the aſſent of the Executors, and afterwards he in the remainder, during the life of the firſt deviſee, aſſigned it to another, and after the firſt deviſee died: it was adjudged in this caſe, that the aſſignment was void; for he in remainder had but a poſſibility during the life of the firſt deviſee; for that is as much in law, as if the land had been deviſed to him for ſo many years if he ſhould live, or for all the term if he ſhould ſo long live; ſo as the intereſt of the term *ſub modo* was in him, and the other in remainder had but a poſſibility, which he could not grant over. *(t)*

(*t*) C. lib. 4. *Fulwoods* caſe.

Caſes

Caſes in Law touching deviſes of Chattels perſonall.

THE uſe of Chattels perſonall may be bequeathed to one for life, and after the property to another; ſo that if one will that A. B. ſhall enjoy the uſe of his houſhold-ſtuff during his life, and after that it ſhall remain to J.M. this is a good deviſe thereof to J. M [a]. But if the property of the thing be bequeathed to the firſt of them, then it is otherwiſe: for the gift of a Chattell perſonall, though but for an hour, is a gift thereof for ever; Provided that the Teſtator makes it abſolute, not conditionall [b].

[a] 37 H. 6. fol. 30. Brook Novel caſ. § 388. Brook tit. deviſe, pl. 13.

[b] H. 9 Car. B. R. the Lady *Davyes* caſe.

A man poſſeſſed of certain goods deviſed them by his will to his wife for life, and after her deceaſe to J. S. and died; J. S. in the life-time of the wife did commence ſuit in a Court of equity, to ſecure his intereſt in the remainder: adjudged that the deviſe in remainder of goods was void; and therefore no remedy in equity. It was agreed, that a deviſe of the uſe and occupation of lands, is a deviſe of the land it ſelf; but not ſo of goods: for one may have the occupation of them, and another the intereſt in them [c],

[c] T. 17 Car. B. R. March 106.

Sir *Fitzjames*, chief Juſtice of *England*, deviſed his lands to *Nicholas Fitzjames* in tail, with divers remainders over; and deviſeth the uſe and occupation of his Jewels and plate to *Nich. Fitzjames* and the heirs males of his body, according to the eſtate in the land: adjudged that *Nich.* had no property in the goods, but onely the uſe and occupation [d].

[d] T. 7 Eliz. Sen'or *Fitzjames* caſe.

A. is poſſeſſed of 6 marble Statues, and a great quantity of other marble; he deviſeth 2 of his marble Statues and all his other marble to B. in this caſe the other 4 Statues will not paſs to B. by reaſon of the intent of the Teſtator, who expreſly gave him two [*].

[*] L. 1. de aur. & argent. legat. & L. legat. de ſupellect. legat. & L. hæres meus. § duæ. & gloſ. ibid. de legat. 3. Dict. L. legat. & Cujac. in dict. L.

If I deviſe my houſe to A. with all the things therein when I ſhall die; ſuch things as are there onely by chance, and did not uſe to be there, ſhall not paſs by that deviſe; yet ſuch things ſhall paſs which uſed to be there, though by ſome accident they were not then there: but money found there, which not long before was received from debtors, and intended to be again lent out, doth not paſs by ſuch deviſe [f].

[f] L. ſi ita legat. & gloſ. ibid. de legat. 3.

If a man doth deviſe all that he doth poſſeſs in *London*, his books of accompts or caſh in his cheſts which he hath in *London* do not paſs by ſuch generall words [g].

[g] L. uxorem. § legaverat. & gloſ. ibid. de legat. 3.

A man having two horſes, doth by his will deviſe the two horſes which he ſhall have at the time of his deceaſe, after the Teſtator ſells his two horſes, and at his death is found to have two mares onely: in this caſe the legatary ſhall have the two mares; becauſe in conſtruction of Law the feminine in ſuch caſes is compriſed in the maſculine [h].

[h] L. qui duos. & gloſſ. ibid. de legat. 3.

A Teſtator bequeaths an Oxe to one, the Oxe dies before the day comes for the delivery of it to the Legatary; he ſhall have neither his fleſh nor his hide: otherwiſe if he had died after the day for the delivery thereof was come [i].

[i] L. mortuo bove. & gloſſ. ibid. de legat. 2.

The Earl of *Northumberland* deviſed by his will his Jewels to his wife, and died poſſeſſed of a Collar of S's, and of a garter of gold, and of a button annexed to his bonnet, and alſo of many other buttons of gold and precious ſtones annexed to his robes, and of many other chains, bracelets, and rings of gold, and precious ſtones. Reſolved that the garter and collar of S's did not paſs, becauſe they were not properly Jewels, but enſigns of honour and ſtate; and that the buckle of his bonnet and the button did not paſs, becauſe they are annexed to his robes, and were no Jewels: but for the other chains, bracelets and Jewels, they did paſs [k].

[k] 26 Eliz. le Counteſs de *Northumberlands* caſe.

A. B. being poſſeſſed of ſeveral houſes by leaſe, doth deviſe two of them in his laſt Will and Teſtament unto C. D. ſuch as he ſhall chuſe, or two of them to C. D. whether he will, the reſt to J. G. In this caſe, if C. D. refuſe to take by this deviſe, and will chuſe neither of the ſaid houſes, J. G. ſhall have them all [l].

[l] L. cum optionibus. de optionibus legat.

If a Teſtator appoint his Executors to pay unto A. B. the ſum of 10 li. *per annum*, and he live ſix years and four months, the Executors of A. B. ſhall receive 10 li. for the whole ſeventh year: becauſe ſuch an annuity is due in the beginning of every year, when no certain time is ſet by the Teſtator for the payment of it [m].

[m] Gloſſ. in L. à vobis. de annuis legat.

A man deviſed all his movable goods and chattels: debts due to the Teſtator did not paſs by this deviſe; becauſe debts are *jura*, and cannot be deviſed by thoſe words [n].

[n] T. 6 Car. B. R. *Sparke* verſus *Denn.* Jones rep. fol. 225.

§ VII. Of aſſigning Tutors, and diſpoſing of Childrens Portions during their minorities, generally conſidered.

1. *Many queſtions about the Tuition of Children.*
2. *The matter of tuitions both large and uncertain.*

IF I ſhould undertake to ſpeak fully of the aſſignment or appointing of Tutors to children, and cuſtody of their portions or other rights during their nonage, not onely (1) many queſtions would offer themſelves to be handled, (namely, who may grant the tuition, of whom, to whom, after what manner, what is the office and authority of a Tutor, when the tuition is finiſhed, what action the pupill hath againſt the Tutor for the recovery of his rights, or the Tutor againſt the pupill for the charge of his education, and conſervation of ſuch things as are due to the child; and finally, if the Tutor Teſtamentary excuſe himſelf, or refuſe the tutorſhip, what order is to be taken in the behalf of the child;) which queſtions are ſo ample, and miniſter ſo great abundance of matter, that it is not poſſible to apprehend the ſame within any compaſs fit for this brief Treatiſe: But farther, the cuſtoms of this

Realm

Realm are ſo (2) diverſe and contrary one to another, which do concern this matter, that I might eaſily fall into divers errours.

Wherefore, as well for that this matter ſhould not exceed the proportion of a juſt member, as alſo for that I would be loth to play the blind guide, I thought it better, and more ſafe, to refer the Reader to the learned of every place, of whom he may be more ſufficiently certified of their particular cuſtoms, then to fill up this Volume with the multitude of different, yea and contrary obſervations, of ſundry countries and places within this Realm, whereof I can obtain no ſounder warrant, nor better aſſurance of the legality thereof, then the bare reports and relations of others.

Howbeit, foraſmuch as within the Province of *York* I my ſelf have had ſome reaſonable experience in theſe affairs for many years; I thought it not amiſs, briefly to ſignify what is there obſerved.

§ VIII. Of the committing of the Tuition of Children, and cuſtody of their portions, within the Province of *York*.

1. *No Parents in any Country have like power over their Children as had the* Romans.
2. *Whence the authority of aſſigning children did deſcend.*
3. *The cuſtoms of the North parts of this Realm do very much reſemble the Civill Law.*

ALbeit (1) neither within this Realm of *England*, nor within any Realm Chriſtian, any Parents have the like power over their Children as had the *Romans* [a], to whom alone that *patria poteſtas* was proper and peculiar [b]; which was (2) the chief cauſe whereby they did and might by their Teſtaments commit the bodies of their children, and their portions, at their pleaſures, to the cuſtody of others, according to the Civill Law [c]: yet (3) in divers places within this Realm, and namely throughout the Province of *York*, there doth remain a certain reſemblance of that power and determination of the Civill Law; as in many other things, ſo alſo in the aſſigning or appointing of Tutors by their Teſtaments or laſt Wills [d]; whether we regard the perſon of the Teſtator, or of him that is aſſigned Tutor, or of the Children, or the manner of aſſignation, or the office and authority of the Tutor, or the means whereby the tuition is ended, which I muſt onely point at.

[a] § Jus autem. Inſtit. de tutelis, & ibi gloſſ. in qua enumerantur ſeptem aut octo, in quibus jus patriæ poteſtatis conſiſtit.

[b] Eod. § nec non tract. de repub. Angl. lib. 3. c. 7. Intellige tamen ut in gloſſ. in d. § Jus autem.

[c] L. 1. ff. de teſta. tutel. § permiſſum. Inſtit. de tutel.

[d] Ut patet ex his quæ ſubſequuntur §§ 9, 10, 11, 12, 13, 14.

§ IX. Who may appoint a Tutor.

1. *The Father may appoint a Tutor by his Teſtament or laſt Will.*
2. *Whether the Mother may appoint a Tutor.*
3. *Whether a Stranger may appoint a Tutor.*
4. *Whether the Ordinary may aſſign a Tutor.*

UNderſtand therefore, that by generall cuſtom obſerved within the Province of *York*[a], (1) the Father, by his laſt Will or Teſtament, may for a time commit the Tuition of his Child, and the cuſtody of his portion[b]: for within that Province Children have their filiall portions of their Fathers goods, according to the Civill Law[c]; except he be Heir, or advanced in the life-time of his Father[d]: which Teſtament and aſſignation is to be confirmed by the Ordinary *[*]; who alſo is to provide for the Execution of the ſame Teſtament[f].

[a] De qua conſuetudine apertiſſime, per indubitatæ fidei acta & inſtrumenta antiqua in archivis Archiepiſcopi Ebor. repoſita, conſtat.

[b] Fateor quidem noſtratium liberos ab illa patria poteſtate fere ſolutos, & quaſi emancipatos eſſe, ut refert D. Smith in ſuo tract. de repub. Angliæ. Quin tamen hæc conſuetudo, quæ vel præcipue in partibus Borealibus viget, ſumma nitatur æquitate & ratione, negari non poteſt. Quis enim diligentius de pupilli rebus cogitat, quam parentes? aut cui majori curæ eſſe poterit? ut ex eo maxime, quantumvis nulla alia ſubeſſet cauſa, iis liceret morientibus in Teſtamentis ſuis deſignare liberis vice parentis eos, quorum experta fide, norunt futuros eſſe liberis ſuis tutores, id eſt tuitores, ſive defenſores.

[c] Et quidem debetur eadem prorſus quantitas: nam ut quandoque triens, quandoque ſemis competit, (auth. noviſſimo. C. de inoffic. teſtimon.) pro numero liberorum; ita jure quo nos utimur, media pars debetur liberis, nulla relicta uxore, qua ſuperſtite, tertia pars bonorum iis competere dignoſcitur. Infr. ead. part. § 16. [d] Vid. infra ead. part. §16. * Id quod juri civili conſonat. ſc. ſi pater filio emancipato tutorem aſſignaverit, omnino Judicis ſententia confirmandus eſt. § fin. Inſtit. de tutel. [f] Infra part. 6. § j.

If the Father die, no Tutor being by him aſſigned, and (2) the Mother do in her laſt Will and Teſtament appoint a Tutor, the ſame Will is to be proved, and the aſſignation of the Tutor confirmed[g].

[g] Confirmatur quidem tutor à matre datus, ſed cum inquiſitione, propter fragile mulieris conſilium. Sufficit vero modica inquiſitio, filius ſi inſtituatur, alias requiritur magna. L. mater. C. de teſta. tutel. L. 2. ff. de confir. tut. Bar. in L. naturali. § ſi quæratur eod.

And if no Tutor be aſſigned by either of the Parents, then (3) may a ſtranger, if he make the Orphan his Executor, and give him his goods, aſſign a Tutor unto him[h]; which Tutor is by the Ordinary to be confirmed[i].

[h] L. patronus. ff. de confir. tut. nam qui inſtituit impuberem, videtur eum eligere quaſi in filium: & ipſe habetur loco patris. Bald. in d. L. ſi patronus. [i] d. L. ſi patronus.

And if there be no Tutor Teſtamentary at all, then (4) may the Ordinary commit the tuition of the Child to his next kinſman[k], demanding the ſame, according as in adminiſtrations where any dieth

[k] De hac poteſtate teſtimonium non obſcurum perhibent omnia fere acta & inſtrumenta, tum recentia tum antiqua, in Archivis publicis Archiepiſcopi Ebor. fideliter cuſtodita.

inte-

inteſtate [l]; ſo that the Child be not Ward, for then the Ordinary may not diſpoſe of the cuſtody of his perſon, as is hereafter declared [m].

[l] Nam ubi ſucceſſionis emolumentum, ibi reſidet tutelæ onus. L. 1. ff. de tutel.

[m] Infra ead. part. § 11.

§ X. Who may be appointed Tutor.

1. *He that cannot be Executor, cannot be Tutor.*
2. *Whether he that is under age or lunatick may be appointed Tutor.*
3. *Whether a Woman may be Tutrix.*

ANY perſon may be aſſigned Tutor which is not forbidden [a]. Who is forbidden, may appear by that which is hereafter ſpoken of an Executor [b]: for (1) he that cannot be an Executor, cannot be a Tutor [c].

[a] Quando excipiuntur aliqui, reliqui proculdubio admittuntur. Nam firmat exceptio regulam in non exceptis. Dec. & Cagnol. in L. 1. de reg. jur. ff.

[b] Infra part. 5.

[c] L. teſta. ff. de teſta. tutel.

He (2) that is not 21 years old, or is not of perfect mind and memory, may be aſſigned Tutor: but it is to be underſtood, that he ſhall be Tutor when he is of full age, or when he doth return to ſanity of mind [d].

[d] § furioſus. Inſtit. qui tut. teſta. dari poſ.

By the Civill Law, (3) a Woman (the Mother and Grandmother excepted) cannot be aſſigned Tutrix *: but it is not obſerved as a law within the Province of *York*, where not onely the Mother and Grandmother are admitted, but other women alſo, albeit they be married, and under the government of their husbands [f].

* L. jure noſtro. lib. 2. teſta. tuit. ff.

[f] Ut per acta & inſtrumenta d. ſcaccar. Archiepiſcopi Ebor.

An Action of treſpaſs was brought by the Mother, *Quare N. filiam & hæredem ſuam rapuit & abduxit. Per Catesby*, ſuch a writ lieth not for the Mother, but it lieth for the Father; for he of common right ſhall have the wardſhip of his ſon or daughter [g].

[g] 9 E. 4. fo. 53. Brook tit. gard. pl. 55.

§ XI. To whom a Tutor may be appointed.

1. *A Tutor may be aſſigned to him that is not fourteen years old, and to her that hath not accompliſhed twelve.*
2. *After fourteen and twelve, he and ſhe may chuſe their Curators.*
3. *When the Curator is to be confirmed.*
4. *A Tutor may be aſſigned to the Child unborn.*
5. *No Tutor can be aſſigned unto him that is Ward by reaſon of his Lands.*
6. *Neither to Infants or Idiots Wards.*
7. *Who ſhall have the Wardſhip of a Child that hath Lands.*
8. *What the Gardian may doe.*
9. *The hard eſtate of Wards.*
10. *All Infants Wards are not ſubject to like conditions.*

11. *Who ſhall be Gardian to the Infant which hath Lands in ſocage.*
12. *Prochein Amie accountable to the Ward after his full age.*
13. *Idiots in the cuſtody of the Prince.*
14. *Whether the cuſtody of an Infant or Idiot may be deviſed by the Teſtator.*

BY the ſaid cuſtome generally obſerved within the Province of *York*, (1) a Tutor may be aſſigned to a boy at any time untill he have accompliſhed the age of fourteen years, and to a wench untill ſhe have accompliſhed the age of twelve years [a]. But (2) after thoſe years, he or ſhe reſpectively may chuſe their own Curators, notwithſtanding their father's Will [b]. But if they do not elect any other Curator after their ſeverall ages, (3) then he that is aſſigned in the will is to be confirmed Curator to either of the ſaid children, albeit he were above fourteen years, and ſhe above twelve, when the will was made [c].

[a] L. tutel. C. de teſta. tut. § permiſſum. Inſt. de tut. tit. quibus modis tut. finitur. Inſtit. in prin.

[b] § Item inviti. Inſt. de curator. L. divus. § curatores. ff. qui petunt. L. matris. C. eod.

[c] in fin. quam op. longævus approbavit uſus.

[c] L. tutelæ. C. de teſta. tut. § dantur. Inſt. de cura.

A (4) Tutor may alſo be aſſigned to a child that is not born [d]: likewiſe to an Idiot, or him that is lunatick [*].

[d] § cum autem. Inſt. de tut.

[*] § furioſi. Inſtit. de cur. & licet hujuſmodi perſonæ majores ſint 25 annis, erunt ſub curatione. d. § furioſi. An hæc authoritas ſit penes teſtatorem, vel ordinarium, an ad regem ſpectet jure prærogat. Quære infr. in d. §.

But all this which is here afore ſaid is to be reſtrained, ſo that it (5, 6) be not to the prejudice of him that is a Gardian, or hath the wardſhip of any Infant or minor [f], or of any Idiot, by reaſon of any Lands, Tenements or Hereditaments, belonging to ſuch Infant or Idiot [g]. For by the Common Laws of this Realm of *England*, (7) the Lord of whom the infant doth hold his Lands, ſo ſoon as the Father dieth, hath the wardſhip and keeping of the Heir; and thereby (8) may ſeiſe upon the body of the ward and his Lands [h], whereof he may alſo take the profits without account, ſo that he nouriſh and bring up the Ward [i]: and not that onely, but alſo offering to his Ward convenable Marriage, without diſparagement, before one and twenty years, if it be a man, or fourteen, if it be a woman, if the Ward refuſe to take that Marriage, he or ſhe muſt pay the value of the marriage [k]; which is commonly rated according to the profits of his Lands. Which (9) is a thing utterly condemned of ſome, and greatly lamented of many, both grave and godly, becauſe of the unſatiable covetouſneſs of divers in theſe days [l]. For that thereby it cometh to paſs many times, that a Free-man and a Gentleman, whiles he is an infant of ſlender diſcretion, and leſs experience, deſtitute of his beſt friend, that is to ſay, his naturall Father, and conſequently ſubject to the ſubtilties and importunities of his crafty and covetous Gaoler, is bought and ſold like a beaſt, to ſuch as ſeek to make moſt advantage of him; and in the end, beſides many moe inconveniences, matched to my Maſter's daughter, ſiſter, couſin, or ſome other female, to whom, for her vertues and gentle conditions, if thine enemy

[f] Habenti tutorem tutor non eſt dandus. § interdum. Inſt. de cura.

[g] Stat. prærogat. regis, c. 9. Fitz. Breve de idiota inquirendo.

[h] Tract. de rep. Ang. lib. 3. c. 5. per ſtat. de prærog. regis, an. 17 Ed. 2. c. 1. & 6.

[i] d. tract. de rep. Ang.

[k] Stat. Weſt. c. 22.

[l] Vide d. tract. de repub. Ang. lib. 3. cap. 5. *Terms of Law*, verb. Gardein.

enemy ſhould be preferred in marriage, thou couldſt wiſh him no greater torment, (if it were lawfull for thee to wiſh him any torment,) Hell excepted.

To theſe perils are theſe infants ſubject which hold Lands of other by Knights ſervice, called in French *Garde noble* [m] : for there (10) is another kind of ſervice, called *Gard Returier*, *alias Gard in ſocage*, or tenure by the plough [n]. This Wardſhip (11) falleth to him that is next of kin, and cannot inherit the Land of the Ward [o]; as the Uncle on the Mother's ſide, if the Land deſcend by the Father, or the Uncle on the Father's ſide, if the Land deſcend by the Mother [p].

This (12) Gardian, otherwiſe called *prochein amie*, is accountable for the profits and revenues of the Land to the Ward, as the Tutor for the goods and chattels to the pupill when he is of full age [q].

Concerning Idiots, ſuch is the prerogative of (13) the Princes of this Land, that they ſhall have the cuſtody of all the Lands of naturall fools, and may take the profit thereof without waſte or deſtruction, of whoſe fee ſoever the ſame be holden, finding to them neceſſaries [r]: And after the death of ſuch Idiots, the Land muſt be reſtored to the right Heirs †. But (14) in the mean time, that is to ſay, during the nonage of the Ward, or during the life of the Idiot, the tuition of the body of the Ward or Idiot, or of his Lands, cannot be deviſed by Teſtament to any other perſon, contrary to the courſe of Common Law, in prejudice of him to whom the wardſhip doth belong [t]; ſaving the Teſtator may commit the cuſtody of ſuch goods and chattels, as he doth bequeath to the ſaid Infant or Idiot, to whom he will, and during ſo long time as he will [v]. If the Idiot have Copyhold-land, the Copyhold of this Idiot is not within the ſurvey of the Court of Wards, but ſhall be ordered in the Lord's Court, according to the cuſtome of the Manor as touching this point *. Alſo if a Copyholder die ſole ſeiſed of any Lands or Tenements ſo holden, his heir being of the age of fourteen years; then he ſhall pay a fine unto the Lord, and doe fealty, and be admitted Tenant. But if the Heir be within the age of fourteen years, then ſome Gardian ſhall be admitted to occupy his Copy-hold, and to pay, and doe his ſervice due for the ſame: that is to ſay, if the Lands deſcend from the Father, then the Mother, or ſome of her next kin, ſhall have the occupation of the ſame Lands, untill the Heir be of the age of fourteen years; and they ſhall pay a little fine for the Gardianſhip, and the Heir at his entry ſhall pay the whole fine ‖.

If a Copy-holder be a lunatick, and the Lord of the Manor commit the cuſtody of his land unto J. S. and treſpaſs is done to the land, the action of treſpaſs ought to be brought in the name of the lunatick, and not of the Committee; for the Committee is but as bailiff, and hath no intereſt, but for the profit and benefit of the lunatick, and is as his ſervant: and it is contrary to the nature of his authority, to have an action in his own name, for the intereſt and the eſtate and all power of ſuits is remaining in the lunatick. And it hath been adjudged that a lunatick ſhall have a *Quare impedit* in his own name. Vid. *Beverleys* caſe, C. lib. 4. the difference between a Lunatick and an Idiot. *Per Curiam*

[m] d. tract. eod. c. 5.

[n] Eodem loco.

[o] Stat. Marleb. c. 17. an. 52 H. 3.

[p] Brook tit. gardein & prochein amie, n. 11, 12, 13. *Terms of law*, verb. prochein amie.

[q] d. ſtat. Marleb. c. 17. d. tract. de rep. Angl. lib. 3. c. 5.

[r] Stat. Ed. 2. de prærog. reg. c. 9.

† Eod. ſtat.

[t] Quia tutorem habenti tutor non datur.

[v] Siquidem unuſquiſque poteſt rebus ſuis quam velit legem imponere. Mantic. lib. 7. tit. n. 38. & teſtatoris voluntas habetur pro lege. L. ſervus. ff. de manumiſſ. licet alias videatur per Firzher. Nat. Bre. de idiota inquirendo, quod bona quæ idiotæ obveniunt ſuo gardiano accreſcunt. Quære tamen per Stamford ſup. d. prærog. reg. c. Idiot. vide Dyer fol. 303. Anno 13 Eliz.

* Dyer fol. 303. An. 13 Eliz.

‖ Jonas Adams Court Baron, fol. 14.

Curiam, the Lord of a Manor hath not power to commit or diſpoſe of the Coy-hold of a Lunatick without ſpeciall cuſtome, neither can he commit during the minority of an infant Copy-holder without cuſtome[a]. When a Lunatick cometh to his ſane memory, he ſhall have an account of the profits of his land: but in caſe of an Idiot it is otherwiſe, for the King or his Patentee ſhall have them to their own benefit[b].

[a] P. 16 Jac. *Huttons* rep. fol. 16.

[b] 28 H. 8. Dy. fo. 26.

§ XII. Of the manner of appointing Tutors.

1. *A Tutor may be appointed ſimply or conditionally, to a day, or from a day.*
2. *The condition depending, what is to be done in the mean time.*
3. *Lawfull to appoint one or many Tutors.*
4. *Whether, where one Tutor is appointed, another may be received.*
5. *Whether divers being aſſigned, one Tutor alone may be admitted.*
6. *By what words a Tutor may be appointed.*
7. *What if the Teſtator ſay, I commit my Children to thy power, or to thy hands?*
8. *What if he ſay, I commit my Children unto thee quick and dead?*
9. *What if he ſay, I deſire thee to take care of my Son?*
10. *The Teſtator may uſe any language in the aſſignation of a Tutor.*

BY the ſaid generall cuſtome, it is obſerved within the Province of *York*[a], that (1) a Tutor may be aſſigned either ſimply or conditionally[b], and untill a certain time, or from a certain time[c]. But no Tutor may intermeddle as Tutor, untill he be confirmed by the Ordinary, albeit he be aſſigned Tutor ſimply[d]: much leſs where he is aſſigned conditionally, or from a certain time, may he intermeddle as Tutor, untill the condition be extant *, or the time limited be expired[f]. But the Ordinary (2) may in the mean time commit the tuition, & he that is ſo appointed by the Ordinary may for that time adminiſter[g].

[a] De qua perplurima acta & teſta. in d. ſcaccario exiſt.

[b] § ad certum. Inſtit. qui teſta. tutor dari poſſ.

[c] Eod. § ad certum. L. tutor. § tutorem. de teſtament. tut. ff.

[d] L. legitimus. & ibi Bar. ff. de legit. tutel.

* L. qui ſub conditione. ff. de teſta. tutel.

[f] d. L. qui ſub conditione.

[g] Bar. & alii in d. L. qui ſub conditione.

Moreover, (3) it is lawfull to appoint either one Tutor alone, or many together[h]. Where (4) one alone is appointed Tutor by the Teſtator, the Ordinary ought not to joyn another Tutor[i]; unleſs he that is named Tutor be lunatick[k], or be abſent about the affairs of the Commonwealth[l]: for in theſe and other like caſes another Tutor may be joyned[m], at leaſt during the impediment. Where (5) divers are appointed, there one alone may adminiſter[n]. Which concluſion doth

[h] L. ſi plures. ff. de teſta. tut.

[i] § Interdum. Inſtit. de cura.

[k] L. non ſolum. § ult. ff. de excuſ. tut. gloſſ. in d. § interdum. Inſt. de curator.

[l] L. tutor. § ſi quis abſuturus. ff. de ſuſpect. tut.

[m] Gloſſ. & Minſing. in d. § interdum. Inſtit. de cur.

[n] L. 3. de adminiſt. tut. ff.

proceed

proceed with leſs difficulty, when the co-tutors cannot or will not meddle [o]; or transfer their authority to him which dealeth [p]: for they may doe that, and ſo alſo be his ſureties [q].

[o] L. legitimos. § in legitimis. ff. de legit. tut. L. 47. de adminiſt. tut. [p] Bald. in L. qui pupill. C. de negotiis geſt. [q] L. Romanus. ff. de tutor. vel curator. dat. ab his.

It skilleth not (6) by what words the Tutor be appointed, ſo that the Teſtator's meaning do appear: for they are nevertheleſs to be confirmed Tutors [r].

Wherefore (7) if the Teſtator ſay, I commit my Children to the power of A. B. or, I leave them in his hands, it is in effect as if the Teſtator had ſaid, I make A. B. Tutor to my Children †. So it is, if he ſay, I leave them to his government, regiment, adminiſtration, &c [t].

[r] L. 1. de confir. tut. ff. & ibi Bar. L. quoniam. C. de teſta. Socin. conſil. 83. vol. 1. † Jaſ. in L. manumiſſionis. ff. de juſtit. & jure. Boer. deciſ. 124. ubi atteſtatur hanc opinionem & tutiorem, & veriorem eſſe. [t] Molin. in addic. ad Decium in c. ex part. de app. extr. Socin. conſil. 83. vol. 1.

If (8) the Teſtator ſay, I commit my Son to A. B. both quick and dead, with all his Legacies by me given: by theſe words it is preſumed that the Teſtator meant, that A. B. ſhould be Tutor to his Child, if he lived; and if he died, then to have thoſe Legacies [v].

[v] Soc. in d. conſil. 83.

If (9) the Teſtator ſay, I deſire my wife to take care of my Children during their minorities: albeit thoſe words do not neceſſarily infer or conclude a tuition of their own nature, but rather that ſhe ſhould chaſtiſe them, when they deſerved to be corrected [x]; (for, to have tuition of children is a greater thing, and extendeth farther, then to have a care of them onely [y];) nevertheleſs, foraſmuch as the ruder ſort of people do not know the difference of terms, nor the naturall force of words [z], therefore, if any be aſſigned Tutor by theſe foreſaid words, he is to be confirmed [a].

[x] Dec. in d. c. ex part. de app. extr. Boer. deciſ. 124. in princ. [y] Dec. in d. c. ex part. [z] Socin. d. conſil. 83. vol. 1. [a] L. 1. de confir. tut. ff. & ita limitatur. § quanquam in. L. aliena. ff. de neg. geſt. ut per Jaſ. in L. manumiſſionis. ff. de juſtit. & jur.

The ſame alſo may be ſaid, where the Teſtator doth commit his child to the cuſtody of another. For albeit it be a greater thing to have the tuition of a child, then to have the bare cuſtody of a child committed unto him [b]: yet in all things the will and meaning of the Teſtator is to be obſerved [c], and preferred before the property of the words [d], whereof perhaps he is ignorant: which meaning is to be collected by that which went before or followeth after in the Will, and by other circumſtances, which the diſcreet Judge ought to enquire *.

[b] Rom. ſing. 164. Dec. in c. ex part. de app. extr. [c] d. L. 1. de confir. tut. & DD. in eand. L. Molin. in addic. ad lect. Decii in d. c. ex part. M. [d] L. quoniam indignum C. de teſtam. * Boer. deciſ. 124.

Finally, (10) it skilleth not in what language the Tutor be aſſigned, whether in Engliſh, Latine, Greek, or any other tongue [f].

[f] L. ult. C. de teſta. tut.

§ XIII. Of the office and authority of a Tutor.

1. *The office of a Tutor doth principally reſpect the perſon of the pupill.*
2. *The office of a Tutor doth ſecondarily reſpect the good adminiſtration of the pupill's goods.*
3. *The Tutor ought to make an Inventory, and is chargeable with an account.*
4. *Whether a Tutor ought to enter into bonds for the performance of his office.*
5. *Of the authority of a Tutor.*
6. *Whether the Tutor may alienate the goods of the pupill.*

THe office and authority of the Gardian, or him that hath the wardſhip of an Infant, by reaſon of any Lands, Tenements or Hereditaments, whether the ſame be holden by Knights ſervice, or by ſocage tenure, is already declared [a]; wherefore in this place I ſhall onely touch the office and authority of a Tutor, according to the cuſtome obſerved within the Province of *York*, not greatly differing from the diſpoſition of the Civill Law.

[a] Supra ead. part. § 1. n. 8, 9.

This therefore is the office of a Tutor. Firſt and (1) principally, to defend the perſon of his pupill [b]; that is to ſay, to provide that he be honeſtly and vertuouſly brought up, and to provide for him meat, drink, cloath, lodging, and other neceſſaries, according to the Child's eſtate or condition, and ability [c].

[b] Inde tutores, quaſi tuitores, id eſt, defenſores, à tuendo & defendendo, appellantur; ſicut æditui dicuntur, qui ædes tuentur. § tutores. Inſtit. de tutel. L. ff. eod. [c] Nec tantum alimenta præſtari debent pupillo, ſed etiam in ſtudia impenſæ debent impendi pro facultate patrimonii, & dignitate natalium. Wigand. Happel. tract. de tut. tit. 138. n. 44. fol. 350.

Secondarily, (2) the office of a Tutor conſiſteth in the good and faithfull adminiſtring or diſpoſing of the goods and chattels of the ſaid pupill [d]: that is to ſay, the Tutor may not commit any thing that may be hurtfull, nor omit any thing that may be profitable to his pupill *; and in the end muſt reſtore unto the pupill all his goods and chattels, by him the ſaid Tutor before received [f]. And for that purpoſe (3) every Tutor ought, even at the very entry into his office, to make a true inventory of all the goods and chattels of his pupill [g]; and to make a juſt and true accompt of his dealings in the behalf of his pupill [h]. And it

[d] § datus. Inſtit. de excuſ tut. & Minſing. ibidem.
* Latius de offic. tutoris Happel. tract. de tut. tit. 38. per totum.
[f] L. tutorem quendã. C. de arbitr. tut. Olden. de action. claſſ. 4. action. tut. direct.
[g] L. Tutor qui. repertorium. ff. de adminiſtr. tut. L. tutores, vel curatores. C. de adminiſt. tut. Bar. in d. L. tutor. [h] L. 1. § offic. de tut. & ration. diſtrahend. ff.

is gene-

is generally obſerved within the ſaid Province, that (4) every Tutor, as well Teſtamentary as other appointed by the Ordinary, doth enter into bond with ſureties to the effect aforeſaid, according to the diſcretion of the Ordinary [i].

[i] Hoc uſitatiſſimum eſſe infr. provinc. Ebor. certo certius eſt; utcunque jure civili tutor teſtatorius, vel dativus, ſatiſdare non teneatur. L. teſtamento. de teſta. tutel. L. 2. de confir. tut. ff.

Concerning the (5) authority of a Tutor, as ſoon as he is confirmed, he may ſeiſe upon the body of the pupill [k], and may likewiſe take poſſeſſion of all his goods [l]. And if any do convey away the perſon of the ſaid pupill, he may be convented, and in the end compelled to reſtore him [m]. Likewiſe if any perſon do detain any thing belonging to his ſaid pupill, recoverable in the Eccleſiaſticall Court, he is uſually convented by the Tutor, in the behalf of the pupill [n].

[k] Aymo conſil. 18.

[l] L. 1. ff. de adminiſtr. tut.

[m] Gabr. lib. 5. com. concluſ. c. 1. n. 41. poſt Caſ. conſil. 120. Aymo conſ. 18. n. 6.

forte etiam incidit in ſententiam excommunicationis, quia impedit executionem teſtamenti, per c. ſtatu. de teſta. lib. 3. provinci conſtit. Cant. Fitzh. Nat. Bre. fol. 44. [n] Sed an debet agere, vel conveniri nomine tutorio, Bar. in L. 1. § ſufficit. ff. de adminiſt. tutel. Brook Abridg. tit. garthel. 2.

Furthermore, (6) the Tutor may alienate and ſell ſuch goods belonging to the pupill, as cannot be kept untill he come to lawfull age [o]: but other goods which may conveniently be kept, and continued untill the pupill attain to lawfull years, and eſpecially goods immovable, the Tutor may not ſell nor alienate [p]. Inſomuch that if the Father by his laſt Will declare, that another perſon ſhall have as well the government and education of his Children, as the diſpoſing, ſetting, letting, and ordering of their Lands: yet nevertheleſs, the Tutor in this caſe cannot ſell the ſaid Lands by force of the former words; for that the meaning of the deviſor may be collected to be ſuch, that he would that his Land ſhould be diſpoſed and ordered after a good manner and order for the profit of his Children; whereas if he ſhould ſell the Lands of the Children, that kind of diſpoſing thereof were after an evill order, and contrary to the meaning of the Teſtator [*].

[o] L. lex. C. de adminiſtr. tut.

[p] Eadem L. lex. & ibi Angel. & alii.

[*] Dyer fol. 26. An. 28 H. 8. n. 170.

§ XIV. By what means the Tutorſhip is ended.

1. *The Tutorſhip is ended by divers means.*
2. *In reſpect of the Pupill, the Tutorſhip is ended when he cometh to lawfull age.*
3. *Sufficient age in a man at one and twenty, ſometimes at fourteen.*
4. *Sufficient age in a woman at twelve, fourteen, and ſixteen years, in divers reſpects.*
5. *In reſpect of the Tutor, his office is ended, if he cannot be Executor, or do excuſe himſelf.*
6. *Likewiſe if he be removed as ſuſpected, or become lunatick, or deaf and dumb, or be abſent, or die.*
7. *How the tutorſhip is ended in reſpect of the form of the tuition.*

THe Tutorſhip (1) is ended by divers means, whereof ſome do reſpect the perſon of the Pupill, ſome do reſpect the perſon of the Tutor, and ſome do reſpect the manner and form of the Tuition it ſelf [a].

[a] Vigel. method. jur. civil. part. 2. lib. 5. c. 8. Wigand. Happel. tract. de tut. tit. 55, 56, &c.

In (2) reſpect of the perſon of the Pupill, the Tutorſhip is finiſhed when the pupill hath accompliſhed ſufficient age. Sufficient (3) age in a man is ſometimes at one and twenty years, and not before; ſometimes at fourteen [b]. In (4) a woman ſometimes at twelve, ſometimes at fourteen, and ſometimes at ſixteen [c]. He that is Ward by reaſon of Lands holden in Knights ſervice, is not out of wardſhip untill he be of the age of one and twenty years [d]. He that is Ward by reaſon of Lands holden in Knights ſervice, is not out of wardſhip untill he be of the age of 21 years [d]. He that is Ward by reaſon of Lands holden in ſocage, is then out of wardſhip when he is of the age of fourteen years *; at which years he may refuſe his Gardian, and call him to account [f]. At the ſame age alſo is the tutorſhip ended, (if he have no Lands, but goods,) and the Minor may then alſo call his late Tutor to account [g]: and if he will, he may then chuſe a Curator, either the ſame perſon that was Tutor, or ſome other [h].

[b] Minor quibus caſibus habetur pro majore, vide Repertor. Bertachni, verb. minor. gloſſ. & DD. in c. ex part. de reſtitut. ſpol. extra.
[c] Tract. de republ. Angl. lib. 3. c. 5. Principall grounds, fol. 35. Brook tit. gard. l. 2.
[d] Mag. Char. c. 3. an. 9 H. 3. Bract. de leg. & conſ. Angl. lib. 2. c. 37. Brook tit. gard. n. 111. * *Terms of Law*, verb. prochein amie. [f] Marleb. c. 17. an. 52 H. 3. [g] L. indecorum. C. cum tut. eſſe deſin. Inſtit. quib. mod. tut. fin. in princ. [h] Supr. cad. part. § x.

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A woman as ſoon as ſhe is twelve years of age is out of the government of her Tutor [i]; unleſs ſhe be Ward in reſpect of Lands, for then ſhe ſhall continue Ward untill ſhe be ſixteen years old [k]; except ſhe be of the age of fourteen years at the death of her Aunceſtors: for being of thoſe years at her Aunceſtors death, foraſmuch as ſhe may have an Husband able to doe Knights ſervice, ſhe ſhall not be Ward [l].

[i] Inſtit. quib. mod. tut. fin. in princ.

[k] Brook tit. gard. l. 2. n. 7. Principall grounds, fol. 35.

[l] Tract. de republic. Ang. lib. 3. c. 5. Fitzh. Nat. Bre. fol. 141. D.

In reſpect (5) of the perſon of the Tutor, the tuition is ended, if he become ſuch a one as cannot be made Executor [m], of whom mention is made hereafter [n]; or if he juſtly excuſe himſelf [o]. (But thoſe Laws concerning excuſing of Tutors and Curators are very ſeldom or not at all practiſed; for Tutors now-a-daies are ſo far from excuſing themſelves, that on the contrary they ſtrive and labour mightily to be admitted, turning that to a benefit, which was wont to be a burthen [p].) Or (6) if the Tutor be removed as ſuſpected, the tuition is determided [q]: (and he is ſaid to be a ſuſpected Tutor, which dealeth not faithfully in his office [r]:) or if the Tutor become lunatick; or deaf and dumb; or in that caſe that he cannot govern or adminiſter his goods †; or if he die [t]; or is abſent, being taken of the enemy [v].

[m] L. teſtament. de teſta. tut. ff.

[n] Infra 5. part.

[o] Inſt. tit. de excuſ. tut. lib. 2. § remittit. ff. eod.

[p] Olden. in L. 12 tab. tit. 3. fol. (mihi) 55. Tract. de repub. Ang. lib. 3. cap. 5.

[q] L. ſi adrogati. § pen. ff. de tut. § pen. inſtit. de ſuſpec. tut.

[r] § ſuſpectus. Inſtit. de ſuſp. tut. vel cur. † L. complurima. ff. de tutel. L. poſt ſuſceptum de excuſ. tut. [t] L. Cujus bonis. C. de curator. furioſ. [v] L. ſi adrogati. ff. de tutel.

In reſpect (7) of the manner and form of the tuition the office and authority of the Tutor is determined; as if the Tutor be appointed upon condition, which condition is broken; or if the Tutor be appointed during a certain time, which time is finiſhed [x]: in theſe and many other reſpects (which for brevity I omit) the Tutorſhip is determined [y].

[x] § præterea. Inſtit. quib. mod. tut. fin. L. ſi adrogati. § ſed etſi. & § fin. ff. de tut.

[y] Videant Juſtinianiſtæ Vigelii methodum juris civilis, ubi perplures traduntur cauſæ finiendi tutelam.

§ XV. Of the quantity of Lands deviſable by Will.

1. *Of Lands, Tenements and Hereditaments, ſometimes all, ſometimes but two parts of three, is deviſable.*

NOw that I have ſhewed what kind of things may be deviſed by Will, it remaineth to ſhew how much is deviſable of Lands or Goods.

And firſt (1) concerning Lands, Tenements and Hereditaments, ſometimes they may be deviſed wholly, as Lands, Tenements and Hereditaments holden in ſocage, or of the nature of ſocage tenure [a]: ſometimes two parts of three may be deviſed, namely, of Lands, Tenements and Hereditaments holden in chief by Knights ſervice, or of the nature of Knights ſervice in chief [b]; as appeareth more fully heretofore, where I have ſet down the Statutes at large.

[a] Supra eod. part. § 4.

[b] Eod. § 4.

§ XVI. What quantity of Goods or Chattels may be deviſed by Teſtament.

1. *Legacies to be paid out of the clear debtleſs goods.*
2. *The Executor compellable to pay debts out of his own purſe, if he pay Legacies firſt.*
3. *Funerall expences to be deducted out of the whole goods.*
4. *The Teſtator may ſometimes bequeath all his debtleſs goods, ſometimes half, and ſometies but a third part.*
5. *When half the Teſtator's goods is due to the Wife or Children.*
6. *When the Wife and Children ought to have either of them a third part.*
7. *Whether the Wife and Children ought to have any part of the debts due to the Teſtator.*
8. *Whether the Wife and Children may claim any reaſonable part of Leaſes.*
9. *Whether the Wife and Children may claim a reaſonable part of goods, where there is no cuſtome.*
10. *The reaſon of the Law, which leaveth all to the diſpoſing of the Teſtator.*
11. *The reaſon of the cuſtome, whereby the power of the Teſtator is reſtrained.*

COncerning the quantity of goods and chattels to be diſpoſed, this is firſt to be noted, That the Teſtator cannot bequeath any part of the goods, but where (1) ſomething remaineth clear, the moderate funerals

funerals and the debts due by the Teſtator firſt diſcharged [a]. And therefore, if the Teſtator do bequeath any Legacies by his Teſtament, where his goods and chattels will not ſuffice to diſcharge his funerals and debts, and (2) the Executor pay any of thoſe Legacies, before he have diſcharged the debts, by means whereof there is not ſufficient goods left wherewith to pay the Teſtator's debts: in this caſe the Executor ſhall be charged with the payment thereof out of his own purſe [b], as one that had otherwiſe waſted the goods of the Teſtator [c].

[a] Bracton de legib. & conſ. Angl. lib. 2. cap. 26. n. 2. L. ſcimus. § & ſi præfatam. C. de jure delib. In qua lege aſſignatur ratio quare legatariis præferuntur creditores: nempe legatarii de lucro captando, creditores autem de damno vitando contendunt. d. L. ſcimus. Et licet hæres qui inventario legitime confecto legatariis ſatisfaciat, ſecurus ſit jure civili adverſus creditores, quibus eodem jure conceſſum eſt actionem intentare, non contra hæredem, ſed contra legatarios: longe tamen aliter jure noſtro cautum eſt; quo non legatarios, ſed ipſum executorem convenire permittitur, ut ſtatim ſubjicitur. [b] Fitzh. Abridg. tit. deviſe, n. 1. Brook tit. adminiſt. n. 37. Perkin. tit. deviſe, fo. 109. [c] Doct. & Stud. lib. 2. c. 11. Quam concluſionem facile admitterem, conſcio executore æris alieni. Sichard. in d. § & ſi præfatam. verb. 3. utilitas. & Minſing. in § ſed noſtra. Inſtit. de hæred. qual. & diff. n. 12. Cæterum quod nonnulli ex noſtratibus eandem concluſionem extendunt, ut locum habeat vel ignorante executore alios eſſe creditores; an iſtud verum ſit dubito, durum eſſe non inficior. Et quidem ſummus Juſticiarius Brook oppoſitam ſententiam tenet, niſi ubi Principi quid ſit debitum, quia regia debita ſuo periculo ſcire debet. Brook tit. exec. n. 116.

This then being underſtood, that no Legacy is due, but where there clearly remain ſome goods and chattels, the funerals and debts firſt deducted, (for (3) funerall expences are to be deducted forth of the whole goods, both by the Civill Law [d], and by the Laws of this Realm *;) thou ſhalt underſtand, that of that which (4) remaineth, ſometimes the whole, ſometimes the half, and ſometimes the third part, may be bequeathed or deviſed by the Teſtator, according to the diverſity of theſe caſes following.

[d] L. ſcimus. § in computatione. C. de jure delib.

* Fitzh. Nat. Brev. fol. 121. Doct. & Stud. lib. 2. cap. 10. Brook Abridg. tit. exec. n. 172.

The firſt caſe is, when the Teſtator hath neither wife nor child at the time of his death. For then he may diſpoſe all the reſidue of his clear goods and chattels at his pleaſure [f].

[f] Lindwood in c. ſtat. de teſtam. lib. 3. provincial. conſtit. Cant. verb. defunctum. Bracton de legib. & conſuetu. Angl. lib. 2. c. 26. Tract. de repub. Ang. l. 3. c. 6. Fitzh. Brev. de rationabil. part. bon.

The ſecond caſe is, (5) when the Teſtator at the time of his death hath a wife and no child, or elſe ſome child or children but no wife. In which caſe, by a cuſtome obſerved, not onely throughout the Province of *York*, but in many other places beſides within this realm of *England*, the goods are to be divided into two parts; and the Teſtator cannot bequeath any more then his part, that is to ſay, the one half: for the other half is due to the Wife, or elſe to the Children, by virtue of the ſaid cuſtome [g]. And if the Teſtator have a Wife and a Child or Children, which Child is Heir to the Teſtator, or which Children were advanced by the Father in his life-time; in this caſe likewiſe the goods are to be divided into two parts, whereof the Wife is to have one part to her ſelf, and the other half is at the diſpoſing of the Teſtator *.

[g] Lindw. Bracton & Fitzherb. ubi ſupra.

* Lib. qui inſcribitur Labridgment dez caſes, edit. An. Dom. 1599. f. 181. f. 15. n. 2.

The third caſe is, (6) where the Teſtator leaveth behind him both a Wife, and alſo a Child or Children. In which caſe, by the cuſtome obſerved in divers places of this realm of *England*, and namely within the Province of *York*, the Teſtator cannot bequeath any more of his goods then the third part of the clear goods [h]: for in this caſe the ſaid clear goods are to be divided into three parts, whereof the Wife ought to have one part, the child or children another part, and the third part (which is called the *death*'s part) remaineth to the Teſtator, by him to be given or bequeathed to whom he thinketh good [i]. So that the child or children be not Heir to the Teſtator their Father, or advanced by him in his life-time: for then the goods of the deceaſed are to be divided into two parts, whereof the Teſtator's wife is to have the one half, and the other half remaineth to be diſpoſed by the Teſtator †. And if the Teſtator have wife and children, whereof one is Heir, another advanced, and ſome not advanced by their father in his life-time: in this caſe the goods of the deceaſed ſhall be divided into three parts, whereof the wife ſhall have one, the child or children not advanced another, and the third ſhall be in the power of the Teſtator, to be diſpoſed according to his will ‖. And if the Teſtator, by his Will, bequeath a ſum of money, or a leaſe, or ſome other thing, to ſome of his children not advanced by him in his life-time, in lieu and ſatisfaction of his filiall portion due unto him by the cuſtome of the Country: yet the filiall portions due to the reſt of the children not advanced ſhall not be augmented thereby: neither ſhall the whole third part of the Teſtator's goods be divided amongſt them; but that filiall part or ſhare, otherwiſe due to the child, in lieu whereof he hath a Legacy bequeathed unto him, doth belong to the Executors, in caſe that child accept of the Legacy in lieu and ſatisfaction of his filiall portion *. Which thing is left to his choice, ſo that he may either accept the Legacy, or refuſe the ſame, and challenge his filiall portion; as hereafter more fully is ſet down †.

And here note, that (7) where the wife or children ought to have a ratable part of the goods of the deceaſed, be it a third part, or half, as the caſe yieldeth; there alſo they ought to have a like part of the debts due unto the Teſtator, after they be recovered by the Executor or Adminiſtrator; for then they are numbred or accounted amongſt the goods of the Teſtator, but not before [i]. But (8) of leaſes, the wife and children cannot have any ratable part within the Province of *York*, or other places where they have been accuſtomed to have their ratable part of the movable goods and debts recovered, unleſs the ſaid wife or children, demanding their ratable parts of leaſes, do prove that by ſpeciall cuſtome of that place (namely of that City, County, Deanry, or Pariſh where the Teſtator dwelled, and had ſuch leaſes) the wives and children were accuſtomed to have their ratable part, as well of the leaſes, as of the movable goods of the Teſtator; which ſpeciall

[h] Act. & computat. in Scaccario Archiepiſcopi Ebor. Lindw. Bra. & Fitzherb. ubi ſupra.

[i] Lindwood, Bract. & Fitzh. in locis præd.

† Fitzh. Nat. Bre. ubi ſupra.

‖ Fitzherb. Bracton, Lindw. D. Smith, & alii ubi ſupra.

* Ita non ſemel accepi, & ita ſæpius aliis conſului.

† Vide in cad. part. § 18.

[i] Brook Abrid. tit. exec. n. 112. Siquidem ſi iſta ex conſuetudine tantum debentur, hac non probata, ſine difficultate illud procedet quod eſt juri recepto magis conſonum.

ciall cuſtom being proved, they may recover the ratable part as before [k].

[k] Fitzh. in. Br. de rationab. part. in quo Brevi fit mentio non ſolum bonorum, ſed etiam cattallorum. Atque huc facit quod habemus in Magna Chart. c. 28.

The fourth caſe is, when (9) there is no ſuch cuſtome of dividing the goods of the Teſtator into two parts, or into three parts, as is before mentioned. In which caſe, albeit ſome were of this opinion, that even by the common Laws of this Realm, the clear movable goods were to be divided into three parts, or into two parts, as before, whereof the Wife and Children were to have their parts [l]; and conſequently, that the Teſtator could not diſpoſe any more thereof then the half or third, being the death's part: nevertheleſs others (whoſe opinion hath prevailed) do hold the contrary, to wit, that there is no ſuch diviſion to be made by force of the common Laws of this Land, but onely by force of cuſtome [m]; and conſequently, that it is lawfull for the Teſtator, by the Laws of this Realm, (except in thoſe places where the cuſtome aforeſaid is obſerved,) to diſpoſe all the whole reſidue of his goods (his funerals and debts deducted) at his liking, and that the wife or child can claim no more thereof but according as the Teſtator ſhall deviſe by his Teſtament.

[l] Glanvil lib. 7. c. 5. Fitz. Detinue 56. 60. Mirror 313. M. 30 E. 3. 25. Fitz. reſponſ. 6. H. 17 E. 3. fo. 8. 17. a. Pet. Brock 36. M. 7 E. 4. fo. 20. In hac ſententia ſtetit Glandevile, antiquus hujus regni juriſconſultus, motus per ſtatut. de Magna Chart. c. 18. ut refert Fitzh. in d. Brevi de rationab. part. bon. & Pet. Brook de ration. part. bon. ſic enim poſt multam diſputationem inquit: Et fuit dit pur ley M. 32 Hen. 8. que ceo ad eſtre miſe en ure come un commen ley, & nunquam demurt, & ideo videtur que ceo eſt le commen ley. [m] Fitzh. d. Brc. de ration. part. bonorum. Erac. de legib. & conſuet. Angliæ, li. 2. 26. Tract. de repub. Ang. l. 3. c. 6.

The writ *de rationabili parte bonorum* doth not lie, by the Common law, but there muſt be a particular cuſtome for it: and the writ in the Regiſter is grounded upon a cuſtome. (a)

(a) Regiſt. 142. F. N. B. 122. b.

And the ſaving in the Statute of *Magna Chart.* c. 18. doth not create a new right, but doth preſerve the ancient: and therefore where ſuch a cuſtome is, that the wife and children ſhall have the writ *de rationabili parte bonorum*, that Stat. ſaves it. (b) But it was never the Common law, (though there be great variety in books) as it doth appear by Bract. and other ancient authours and authorities. Bract. lib. 2. fo. 60, 61. Mirror c. 5. § 2. Glanvil lib. 12. c. 20. 31 H. 8. *rationabili parte bonorum*, 7. 6. Inſtitut. part 1. fo. 176. b. Bract. lib. 2. c. 26. Fitz. detinue, pl. 58. M. 40 E. 3. fo. 38. Fitz. reſponſ. 47. H. 39 E. 3. fo. 64. Office of Executor, fo. 150. That it's by Cuſtome in *Suſſex*, vid. P. 39 E. 3. 9. Raſtalls entries, tit. *rationabili parte bonorum*, fo. 541. a. So in the County of *Nottingham*, M. 6 Car. *Sherwin* verſ. *Cartwright*. Huttons rep. fo. 109. So alſo in *Yorkſhire*, Cok. lib. Intrationum, fo. 564.

(b) Inſtit. part. 2. fo. 33.

But the Adminiſtrator of a man which dieth inteſtate, or Executor of any that maketh no diſpoſition of his whole perſonal eſtate, goods,

debts and chattels, that Adminiſtrator or Executor, after the debts paid and will performed, ought not to take any thing to his or their own uſe; but ought, though there be no particular cuſtome, to divide them, according to the Stat. of *Magn. Ch.* c. 18. and the ſaid ancient and latter authorities may guide them therein. And this right doth the Stat. of *Mag. Charta* ſave by theſe words, *Salvis uxori & liberis ſuis rationabilibus partibus ſuis.* And the Executor or Adminiſtrator ſhall be allowed of this diſtribution according to this Stat. upon his account before the Ordinary. *(c)* Yet debts by ſimple contract ſhall be allowed before the reaſonable part. 2 E. 4. 13. 2 H. 6. fo. 16. Lib. 9. fo. 88. *Pinchons* caſ.

(c) Inſtit. part 2. fo. 33.

It hath been much controverted, whether the Ordinary had power to compell the Adminiſtrator to give portions to Children, or to allot and diſtribute filiall portions to the deceaſed's Children out of his eſtate. If the Ordinary attempt this either before or after the granting of letters of adminiſtration, it hath been held, that the Adminiſtrator might have a prohibition. *(d)*

(d) C. lib. 8. fo. 135.

Neither hath he any power to make any diſtribution of the ſurpluſage, nor to take any bond for to anſwer the ſame. *(e)*

(e) M. 15 Jac. in C. B. *Tooker* and *Loames* caſ. Hob. rep. fo. 191. *Slawnyes* caſ. Hob. rep. fo. 83.

If the Ordinary might diſtribute, then the Adminiſtrator might be charged *de bonis propriis*; for there may be dormant debts, and which are unknown. *(f)*

(f) *Bruiſtyrs* caſ. Brownl. part. 1. fo. 31.

Yet notwithſtanding, it's uſual for the Ordinary to order and allot diſtributions of filiall portions, and therein prohibitions are not often granted at this day. *(g)*

(g) H. 13 Jac. *Henſlows* caſ. C. lib. 9. T. 3 Jac. *Davyes* caſ.

It was reſolved in Sr. *Jo. Bennets* caſe, that when a man dies inteſtate, the Ordinary may diſpoſe part of the goods of the inteſtate to pious uſes, but with the cautions following: 1. that it be after Adminiſtration granted, and the Inventory made: 2. the Adminiſtrator ought to be called to it: 3. the uſe ought to be publick and pious: 4. it ought to be expreſſed in particular: 5. there ought to be a decree made of it, and entred on record. *(h)*

(h) M. 20 Jac. in Camera Stell. Sr *Jo. Bennets* caſ. Inſt. part 3. fo. 150.

But now all theſe diſputes and controverſies are fully determined, for by a late Stat. it is enacted, That the Ordinaries ſhall call Adminiſtrators to account for and touching the goods of any perſon dying inteſtate, and order and make juſt and equal diſtribution of what remaineth clear (after all debts, funerals, and juſt expences firſt allowed and deducted,) amongſt the wife and children, or childrens children, if any ſuch be, or otherwiſe to the next of kindred to the dead perſon, in equall degrees, or thoſe that legally repreſent their ſtocks *pro ſuo cuique jure*, according to the laws in ſuch caſes, and in manner and form following:

lowing: that is to ſay, one third part of the ſaid ſurpluſage to the wife of the inteſtate, and all the reſidue by equal portions to and amongſt the children of ſuch perſons dying inteſtate, and ſuch perſons as legally repreſent ſuch children, in caſe any of the ſaid children be then dead; other then ſuch child or children (not being heir at law) who ſhall have any eſtate by the ſettlement of the inteſtate, or ſhall be advanced by the inteſtate in his life-time, by portion or portions equal to the ſhare which ſhall by ſuch diſtribution be allotted to the other children, to whom ſuch diſtribution is to be made, *&c.* And the heir at law, notwithſtanding any land that he ſhall have by diſcent or otherwiſe from the inteſtate, is to have an equal part in the diſtribution with the reſt of the children, *&c.* And in caſe there be no children, nor any legal repreſentatives of them, then one moietie of the ſaid eſtate to be allotted to the wife of the inteſtate, the reſidue of the ſaid eſtate to be diſtributed equally to every of the next of kindred of the inteſtate, who are in equal degree, and thoſe who legally repreſent them. Provided, that there be no repreſentations admitted amongſt collaterals after brothers and ſiſters children. And in caſe there be no wife, then all the ſaid eſtate to be diſtributed equally to and amongſt the children, *&c.* And no ſuch diſtribution to be made till after one year after the inteſtate's death; or without ſufficient ſecurity to be given by thoſe to whom ſuch diſtribution ſhall be made, for refunding back to the Adminiſtrator, (according to each one's ratable proportion,) in caſe of the inteſtate's debts afterwards ſued for and recovered, or otherwiſe duly made to appear. For other Proviſoes and limitations the Reader may conſult the Statute. 22, 23 Car. 2.

And in the opinion of ſome,(10) the Law of this Land, which leaveth all the reſidue to the diſpoſition of the Teſtator, funerals and debts deducted, ſeemeth to have better ground in reaſon then the cuſtome, whereby he is forced either to leave two parts of three, or at leaſt the one half, to his Wife and Children [n]. For what if the Son be an unthrift, or naughty perſon? what if the Wife be not onely a ſharp ſhrew, but perhaps of worſe conditions? Is it not hard, that the Teſtator muſt leave either the one half of his goods to that Wife or Child, or more, for the which alſo peradventure he had laboured full ſore all his life? Were it not more reaſon that it ſhould be in the liberty of the Father, or Husband, to diſpoſe thereof at his own pleaſure? Which when the Wife and Children underſtood, it might be a means whereby they might become more obedient, live more vertuouſly, and contend with good deſert, to win the good will and favour of the Teſtator [o]. Theſe reaſons make for the Teſtator, and for the equity of the Common Law, which leaveth the whole reſidue to his diſpoſition.

[n] Bract. d. l. 2. c. 26.

[o] Hiſce rationibus utitur Bracton in defenſione juris hujus regn. d. c. 26. cui adde Rebuff. in L. obvenire, de verb. ſign. f. ff. fol. 682.

But (11) the cuſtome, whereby the liberty of the Teſtator is reſtrained, is not without reaſon alſo. For where it is asked, What if the child be an unthrift, the wife worſe then a ſhrew? So it may be demanded with like facility, What if the child be no unthrift, but frugall and vertuous?

ous? what if the wife be an honeſt and modeſt woman? which thing is rather to be preſumed [p]. But if it be not amiſs to fear the worſt, then on the contrary, what if the Teſtator be an unnaturall Father, or unkind Husband? perhaps alſo greatly inriched by his Wife, whereas before he was but poor? ſtandeth it not with as great reaſon that ſuch a wife and children ſhould be provided for, and that it ſhould not be in the power of ſuch a Teſtator to give all from them, or to beſtow it upon ſuch as had not ſo well deſerved it, and by that means ſet his wife and children a-begging? ſurely the cuſtome hath as good ground, in reaſon, againſt leud Husbands and unkind Fathers, as hath the Law, in meeting with diſobedient Wives and unthrifty Children [q].

[p] c. dudum. & c. ultim. de præſump. ext. Maſcard. tract. de probac. concluſ. 122.

[q] Mediam viam elegit Juſtinianus, tam quoad uxorem, quam quoad liberos. Nam quod ad uxorem attinet, jubet Imperator, illa bona reſtitui, quæ marito vel ab ipſa uxore, vel ab alio nuptiarum cauſa, nempe ad ſuſtinenda matrimonii onera, donata fuere. l. 2. ſol. matr. ff. Bar. in Rub. ſol. matr. ff. n. 21. Quod autem attinet ad liberos jure civili, Aſſis nunc triens, id eſt, tertia pars totius patrimonii, nunc ſemis ſeu dimidium aſſis, pro legitima debetur. Auth. noviſſimo. C. de inoffic. teſta. Quæ quidem legitima gratis tantum liberis deberi intelligitur: nam ingratis nihil habet parens pro legitima relinquere. Claud. Battandier, tract. de legitima, c. 13.

§ XVII. If the Teſtator do bequeath more then he may, which Legacy is to be preferred, or what other courſe is to be followed.

1. *If the Teſtator bequeath more then the death's part, whether one Legacy is to be preferred before another.*
2. *Divers opinions about this queſtion.*
3. *Firſt, concerning this queſtion, we are to conſider whether there be an Inventory or not.*
4. *An Inventory being made, the Legatary need not pay any one whole Legacy, where there is not ſufficient to pay the reſt.*
5. *Certain caſes wherein an Inventory being made, the Executor is forced to diſcharge ſome Legacies wholly, though there be not ſufficient goods wherewith to diſcharge the reſt.*
6. *If the Executor pay to ſome Legatary his whole Legacy, whether he thereby tie himſelf to pay the reſt wholly alſo.*
7. *Whether the Legacy, being unduly paid, may be recovered.*
8. *No Inventory being made, how far the Executor is bound to pay Legacies.*

NOw that we have ſeen when the Teſtator may diſpoſe all the reſidue of his clear goods, or half, or but the third part onely; and what be the reaſons of enlarging or reſtraining of the liberty of the Teſtator in that behalf: foraſmuch as it doth often fall out in fact, that (1) the Teſtator doth bequeath more by his Teſtament then he

he may by Law or cuſtome; (that is to ſay, more then the whole reſidue, where he may diſpoſe all; or more then the half, where he can give but the half; or more then the third, where he can give no more but the third;) it ſhall not be unprofitable to examine which of the Legacies are firſt to be diſcharged, and namely, whether that Legatary which is firſt named in the will ought to have his Legacy firſt anſwered before the reſt, and he that is named in the ſecond place, to have his Legacy next, and ſo the third, and fourth, untill the death's part be wholly ſpent, and then the reſt of the Legataries to have nothing: or whether the Executor may gratify which of the Legataries he will, without difference whether he be firſt or laſt named in the will: or elſe whether ought every Legatary to ſuffer defalcation, or ratable deduction from every Legacy, to wit, from the greater Legacy the greater part, and from the leſſer Legacy the leſſer part, proportionably, ſo that the Legacies do not exceed the death's part, and that the death's part may ſuffice to pay the Legacies.

It ſeemeth (2) by the opinion of ſome, that a ratable part is to be deducted and taken from every Legacy: and that it is not in the power of the Executor to gratify any one Legatary to the prejudice of another Legatary, whether he be firſt or laſt in the Teſtament [a]; but rather, if the Executor pay to one Legatary his whole Legacy, that then he bindeth himſelf to pay to the reſt of the Legataries their whole Legacies alſo [b].

[a] L. ſi quis teſtamento. § apud Julianum. ff. de leg. 1. & Jaſ. ibid. Paul. de Caſtr. in L. ſcimus. § legitimam creditorib. C. de jure delib.

[b] In Auth. de hæred. & falcid. § non autem. & ibi Bar.

On the contrary, it ſeemeth by the opinion of others, that if the Executor do make an Inventory, then it is in the power and choice of the Executor to pay to which of the Legataries he will his whole Legacy [c]: like as it is in his choice to pay to which creditor he will his whole debt [d], albeit he be not ignorant of other debts of the ſame nature *: and that payment being made accordingly, and no aſſets remaining in the hand of the Executor, the Legatary hath no more remedy againſt the Executor for his Legacy, then hath the creditor for his debt, who by the Laws of this Realm is utterly excluded; and by which Laws it is lawfull for the Executor, to gratify which of the creditors he will [f], ſaving in certain caſes elſewhere mentioned [g].

[c] L. ſcimus. § & ſi præfatam. C. de jure delib. & ibi Jaſ. verb. tertia utilitas. Plowd. in caſ. inter Param. & Yard. his verb. Si home deviſe a A. 20 lib. a B. 20 li. & a C. 20. li. & fait ſon exec. & moruſt, aiant biens forſque al value de 20 li. Ore il eſt in election de executor, a queux de eux trois il voyl payer lez 20 li. & ſil payer a lune, lauter ne poyet contradire ceo, ne ad aſcun remedy pur ſon legacy. fol. 545.

[d] § & ſi præfatam.

* Et hoc ita jure hujus regni, ut infra part. 6. § 16. ſecus jure civil. ut eod. § 16.

[f] Doct. & Stud. lib. 2. c. 10.

[g] Infra part. 6. § 16.

In which contrariety of opinions, this is (3) firſt to be conſidered; whether the Executor do make an Inventory or not.

If (4) the Executor do make an Inventory, according to the Laws and ſtatutes of this Realm, then he need not pay to any Legatary his whole Legacie [h], though he be firſt named in the will [i]. I mean

[h] Paul. de Caſtr. in L. ſcimus. § l'ma creditoribus. C. de jure delib. Alex. in d. L. § & ſi præfatam.

[i] Jaſ. in L. ſi quis teſt. § apud Jul. ff. d. leg. 2.

(I mean, where there is not ſufficient to anſwer to every Legatary his whole Legacy,) but may retain a ratable part, according to the proportion aforeſaid [k]; ſaving (5) in certain caſes: whereof one is, when ſome ſpeciall thing is bequeathed, as the Teſtator's ſignet or his white horſe; which ſpeciall Legacy (as ſome do deem) is to be ſatisfied and payed wholly, without diminution, in reſpect of any other generall Legacies, or of Legacies which do conſiſt in quantity [l]. Another caſe is, when the Legacy is to be diſtributed *in pios uſus* [m]: wherein though ſome be of opinion, that this Legacy is to be wholly ſatisfied before other Legacies generall, or conſiſting in quantity; yet by the common opinion, received and approved of the beſt later writers, this Legacy hath no ſuch priviledge warranted by Law, to be preferred before the reſt *. Another is, when the Father doth bequeath ſomething to his Daughter for her Dowry, or towards her marriage [n]. Another is, when the Teſtator doth bequeath any thing in ſatisfaction or recompence of ſome injury by him done, or of goods evil gotten [o]: for thoſe Legacies alſo are not to be diminiſhed, by reaſon of other generall Legacies, or Legacies conſiſting in quantity, the which ſhall remain wholly unſatisfied, rather then thoſe foreſaid Legacies ſhall be diminiſhed. And conſequently, in theſe caſes it is not in the power of the Executor to gratifie any other Legatary at his election [p].

[k] Imo jure civili legatarius partem indebite ſolutam reſtituere tenetur. Caſtr. & Alex. ubi ſupr. unde fruſtra peteret, quod ſtatim reſtitueret. c. dolo. de reg. jur. 6. non tamen poteſt executor falcidiam retinere. Spec. de Inſtr. edit. § xij. n. 26.

[l] Jaſ. poſt Paul. de Caſtr. in d. L. ſiquis teſt. § apud Jul. quamvis non negem propoſitionem hanc non ſine difficultate procedere.

[m] Caſtrenſ. in d. § apud Jul.

* Licet enim de legatis piis non deducatur falcidia, tamen hoc procedit quoad commodum teſtatoris: ſecus quoad damnum evitandum, ſi legata excedant ſummam vel vires patrimonii; ut ſi centum habeat tantum in patrimonio, & centum quinquaginta erogavit, partim ad pias cauſas, partim ad profanas; tunc enim legata utrinque minuuntur, & reducuntur ad modum & menſuram patrimonii teſtatoris: deinde de profanis detrahitur falcidia, non de piis. Ita tenet Bart. d. Auth. ſimiliter cum pluribus per Tiraquel. allegatis, ex cujus relation. hanc quoque communem aſſerit Vaſqu. de ſucceſſ. progreſſ. tit. 3. § 26. [n] Caſtrenſ. ubi ſupra. [o] Caſtrenſ. in § Federic. de ſenis conſil. 243. [p] Paul. de Caſtr. in d. § apud Jul. cujus conſilio hæc ſunt mente tenenda, quia (inquit) ſunt ſingularia.

Furthermore, (6) if the Executor do make an Inventory, and afterwards pay to ſome Legatary his whole intire Legacy, yet is he not thereby tied to pay the reſt of the Legacies wholly, (the death's part not being ſufficient:) and this is undoubtedly true, if the Executor were ignorant of other Legacies given by the Teſtator [q], exceeding the death's part, when he did pay the whole Legacies [r]. But (7) neither the Executor nor any other Legatary can reclaim or recover that overplus paid, and delivered to the hands of the Legatary, as unduly paid unto him, in reſpect that there is not ſuffi-

[q] Plowd. in caſ. inter Paramor & Yardley. Quod vero Bar. ſcripſit, quod hæres ſubtiliter ſeu ſcienter uni legatario integraliter ſolvens, omnibus aliis in ſolidum ſolvere compellitur, omni penitus inconſtantia amota, intelligendum eſt ſine deductione falcidiæ, id eſt, quartæ hæredi debitæ. (Bar. in § non autem. de hæred. & falcid. in Auth.) Nec enim dixit, neque profecto ſomniavit Bartolus, hæredem compellendum ſolvere reliqua legata ſine diminutione legatorum, quæ ſuperant vires hæreditatis, facta ſcilicet inventario. DD. in Auth. ſed cum teſtator. C. ad L. falcid. [r] L. ſcimus. § & ſi præfatam. C. de jure delib. & ibi gloſſ. ibidem.

ſufficient to pay all the reſt of the Legacies out of the death's part †.

† Hoc verum jure quo nos utimur, quo neque executori neque legatario competat indebiti condictio, vel aliqua actio quæ ſapiat ejus naturam. Imo vero vel ipſo jure civili, utcunque creditoribus vel legatariis per hujuſmodi actiones ſubveniatur; at certe executori legis Falcid. vel Trebel. beneficium prorſus denegatur. Spec. de Inſtr. edit. § nunc vero aliqua, n. 26.

If the Executor enter to the Teſtator's goods, and will make (8) no Inventory thereof, then may every Legatary recover his whole Legacy at his hands [t]: for in this caſe the Law preſumeth that there is ſufficient goods to pay all the Legacies, and the Executor doth ſecretly and faudulently ſubſtract the ſame [v]: whereas otherwiſe the Executor is preſumed not to have any more goods, which were the Teſtator's, then are deſcribed in the Inventory, the ſame being lawfully made [x].

[t] L. ſcimus. C. de jure delib. huc facit c. in literis. de raptor. extr.
[v] Sichard. in d. L. ſcimus. § & ſi præfatam. quod intellige, niſi executor doceat de bonorum inſufficientia; nam tunc præfatam. limitac. 4. confectum, ſive non, ut ait Franciſcus Herculan. tract. de probac. neg. n. 256.

licet non conficiat inventarium, non tenetur ultra vires hæreditatis. Jaſ. in d. § & ſi Covar. in c. 1. de teſta. extr. n. 15. De jure vero regni noſtri, ſive ſit inventarium creditor, ſeu qualiſcunque petens, ſufficientiam probet bonorum, ut videtur per Dyer, M. 6 H. 8. c. 3. & alibi.
[x] Bald. & Sichard. in § l'ma. d. L. ſcimus. & hæc opinio communis eſt,

§ XVIII. Of Childrens or Filiall portions within the Province of *York*.

1. *By ancient cuſtome throughout the Province of* York *every Child ought to have a Child's portion.*
2. *What if he be heir, or advanced by his father in his life-time?*
3. *Divers queſtions about Childrens or filiall portions fit to be known.*
4. *Whether the Father by his will may forbid his Child to have any filiall portion.*
5. *Whether the Father may leſſen his Child's part or portion by his will.*
6. *Whether the Father may impoſe a condition upon his Child's portion.*
7. *Whether the Father may by his Will deferr the day of payment of his Child's portion.*
8. *Whether the Father may impoſe a charge upon his Child's portion, or beſtow it upon another after the death of his Son.*
9. *Whether a Legacy bequeathed by the Father ſhall be underſtood to be left to the Child, in recompence of his portion.*
10. *Whether the heir in tail be barred of a filiall portion.*
11. *What if the Lands be of a very ſmall revenue?*
12. *Whether the Heir in reverſion may have a filiall portion.*

13. *Whe-*

13. *Whether he which holdeth Lands by deed in mortgage may obtain a Child's part of his Father's goods.*
14. *Whether copy-hold Lands bar the Child from a filiall portion.*
15. *What manner of preferment doth exclude the Child from a filiall portion.*
16. *A rude deſcription of preferment excluſive of a Child's part.*
17. *An explanation of the former obſcure deſcription.*
18. *What if another then the Father beſtow a gift upon the Child?*
19. *What if a Father beſtow a thing upon another for the good of his Child, as for learning and knowledge?*
20. *What if the Father beſtow an Eccleſiaſticall benefice upon his Son?*
21. *What if the Father diſcharge the Son's debt?*
22. *What if the Father provide a marriage for his Child?*
23. *What if the Father beſtow an office upon his Child?*
24. *What if the Father bequeath ſomewhat in lieu of his Child's portion?*
25. *What if the Father beſtow a leaſe or an annuity, whereof the Child is to reap no benefit whiles the Father liveth?*
26. *What is meant by this word* Competent.
27. *What if the Father's ſubſtance greatly increaſe after the preferment of his Child?*
28. *A ſmall gift of the Father doth not bar the Child of a filiall portion.*
29. *What is underſtood by this word* Portion.
30. *What if the Father beſtow much upon his Child to ſome other end then for his filiall portion?*
31. *What is ſignified by this word* Patrimonium.
32. *What the words* Matrimonium *and* Patrimonium *do import.*
33. *Whether the Child may caſt in that which he hath received of his Father, and ſo recover a filiall portion.*

WIthin the Province of *York* generally, (and in ſome particular places within the Province of *Canterbury*,) there hath been an (1) ancient Cuſtom ſo long obſerved, as the beginning thereof doth exceed man's memory, and divers famous Writers, dead and buried long agoe, have made mention of the ſaid Cuſtom in their yet living works, to have been obſerved long before their days [a], by which Cuſtom continuing unto this day, there is due to the lawfull Children of every man,

[a] Lindw. in c. Statutum. de Teſtam. lib. 3. Provinc. conſtit. Cant. Bracton de legib. & conſuetud. Angl. lib. 2. cap. 26. Fitzh. Nat. Br. de Rationabili parte bonorum. Doct. & Stu. lib. 1. c. 10. Brook Abridg. Tit. executor. Doct. Smith tract. de Repub. Angl. lib. 3. c. 6. Magna charta, c. 18. Quibus adde Acta, antiquiſſimaque indubitatæ fidei inſtrumenta, in Archivis Archiepiſcopi Eboracenſis fideliter cuſtodita.

being

being an inhabitant or an houſholder within the ſaid Province of *York*, and dying there or elſewhere, being an inhabitant or an houſholder within that Province, a filiall or Child's part and portion, which is ſometimes a third part, and ſometimes a half part, of his clear movable goods; as hath been afore ſhewed: unleſs the Child (2) be Heir to his Father deceaſed, or were advanced by him whilſt he lived [b]. Whereby we may conceive a notable Rule, and two famous Limitations thereof. The Rule is this; *There is due to every lawfull Child a filiall portion of his Father's goods dying within the Province of* York. The firſt Limitation of this rule is, *Unleſs he be Heir to his deceaſed Father.* The other Limitation is, *Unleſs he were advanced by him in his life-time.* And foraſmuch as many (3) queſtions do ariſe daily about Childrens portions, no leſs needfull to be known, by reaſon of the frequency thereof, then hard to be attained, becauſe of the ſcarcity of writers upon this ſubject: I have thought good to ſet down ſome obſervations, as well touching the rule, as touching the limitations, whereby the ſaid queſtions may be decided. Of every of theſe particularly. Concerning the Rule therefore, the ſame doth proceed and taketh place, Firſt, (4) albeit the Father by his laſt Will and Teſtament ſhould forbid his Child to have any part of his goods. For a filiall portion being due unto him by force of the ſaid Cuſtom, the Father's will is not of force to withſtand the effect thereof [c]. Secondly, (5) the Father cannot by his laſt will diminiſh the portion due to the Child by virtue of the ſaid Cuſtom [d]. And therefore if the Father ſhould bequeath to his Child twenty pounds in mony, in full ſatisfaction of his filiall portion, whereas peradventure by the rate of his inventory the ſame would extend to thirty or forty pounds; in this caſe the Child may refuſe the Legacy, and recover his whole portion, notwithſtanding his Father's will *. Thirdly, the Father cannot impoſe (6) any condition upon the ſaid portions, though the ſame were not onely lawfull, but eaſie to be performed. For the Child may recover the portion without performance of the condition [f]. Fourthly, the Father cannot (7) defer the day of payment of the filiall portion due to the Child, as to be paid ſeven years after his death: for it is due preſently upon the Father's death, and is recoverable in the mean time, notwithſtanding the Father's will to the contrary [g]. Fifthly, as the filiall portion is due to the Child without diminution, condition, or delay, ſo is it due (8) without all manner of burthen or charge [h].

[b] Supra ead. parte, § 16.

[c] L. quoniam in ſororibus. c. de inofficioſ. Teſtam. Accedit huc, quod legitima nonnunquam æs alienum nuncupatur, utpote quod jure naturali debetur à patre filio.

[d] d. L. quoniam. c. de inofficioſ. Teſtam. Quod tamen non eſt indiſtincte verum. Nam aliquando filius legitima privatur, ut per Claud. Battandier Tract. de legitima, c. 13.

* Hoc verum eſt jure quo utimur: Nam jure civili filius acceptans quod ſibi relinquitur pro legitima, per hoc non amittit jus agendi ad ſupplementum. Imo etiamſi pater in tali legato appoſuit clauſulam, qua jubet filium contentum eſſe, ita ut non poſſit plus petere nomine legitimæ, vel quacunque alia ratione; tamen filius ſimpliciter acceptans legatum, non expreſſe renuncians, poteſt petere ſupplementum legitimæ. Similiter ſimpliciter acceptans legatum à patre pro legitima relictum, non prohibetur ſupplementum petere, licet fecit quietantiam generalem. Jaſ. in c. ſi quando. § general. C. de inoffic. teſt. [f] d. L. quoniam prioribus. C. de inoffic. teſtam. in textu. [g] d. L. quoniam. & L. omnimodo. C. de inoffi. teſtam. & Claud. Battandier ubi ſupr. [h] d. L. quoniam. ubi apparet quod ipſa conditio vel dilatio, vel alia diſpoſitio, moram vel quodcunque onus introducens, tollitur: id quod viridi etiam obſervantia habetur infra Provinciam Eboracenſem.

And therefore if the Father ſhould by his will bequeath the ſame to any other perſon, after the death of the Child, (which thing is very uſuall within the Province of *York*,) the Father's will is void in this point. For he can no more diſpoſe of his Son's portion by his will, then of another man's goods [i]. Howbeit, if the Father ſhall deviſe any thing to his Son by his will over and beſides his filiall portion, there is no queſtion but he may transfer the ſame to any other after his Son's death; but the portion due to the Son ſhall belong to his Executor or Adminiſtrator after his death. What if the Father ſhall bequeath a Legacy to his Child, being neither Heir, nor advanced by him in his life-time, without any mention whether the ſame ſhall be (9) in lieu and recompence of his filiall or Child's part? whether ſhall this Legacy be underſtood to be in conſideration of his portion, yea or nay? In this caſe, if the Legacy bequeathed be as much or more in quantity then the filiall portion doth extend unto, by the rate of his Father's inventory, the Teſtator is preſumed to have bequeathed the ſame in recompence of the filiall portion [k], though he did not expreſs ſo much. And ſo I think it to be, when the Legacy doth want but a little of the filiall portion, though the Child be then at liberty whether he will accept the ſame for his portion, yea or no, as is afore ſaid. But if the Legacy be very ſmall, or if the Father will that it ſhould be paid out of his part of his goods; then (in mine opinion) the Legacy ſo bequeathed is not to be preſumed to have been left with a mind or intention of compenſation or recompence of the filiall portion [l]. So that in this latter caſe the child may recover as well the filiall portion as the Legacy, but not in the former. Thus much concerning the rule.

Concerning the firſt limitation of this rule, which is, *That he which is Heir to his Father can have no filiall portion of his goods*; This is diverſly extended [m]. Firſt, Not onely the Heir of Lands holden in fee-ſimple is thereby barred from the recovery of a filiall portion, but he (10) alſo that is Heir in fee-tail, either generall or ſpeciall [n]. Secondly, albeit the Lands be (11) of very ſmall revenue, peradventure not paſt a noble yearly rent, and the goods very great in compariſon of ſo ſmall rent, (be it a thouſand pounds or more;) even in this caſe the Heir is barred from the hope of a filiall portion [o]. And though this may ſeem hard to the Heir, if we conſider that ſame *Jus primogenituræ*: yet if we ſhall conſider on the other ſide, that if the Lands be worth a thouſand pounds by the year, and the goods little or nothing worth, (the debts being paid,) and

[i] Supra eod. part. §6. Nec in Anglia aliqua vis eſt pupillaris ſubſtitutionis, utpote quæ evaneſcente patria poteſtate conſiſtere nequit. Inſtit. de pupil. ſubſtitut. & Min. ſing. ibidem.

[k] Nam quando quantitas legati convenit cum quantitate debita, vel eam ſuperat, tunc præſumitur relictum fore animo compenſandi, etiamſi Teſtator ſit debitor ex cauſa voluntaria: multo magis quando tenetur ex cauſa neceſſaria. Menoch. de præſump. lib. 4. præſ. 110. n. 26.

[l] Menoch. d. lib. 4. præſump. 109. n. 6.

[m] Eorum quæ in hoc paragrapho traduntur notitiam, magis obſervata quidem conſuetudine, quam inſpecta lege ſcripta, nactus ſum. Quam propterea mandari ſcriptis curavi, ne veritas deinceps lateat in tenebris, ſed lucis inſtar, amotis nubibus, omnibus quorum intereſt clarius ſplendeſcat.

[n] Hoc ipſum omnes uno ore fatentur. [o] Hanc ſententiam bonæ memoriæ D. Jo. Savil. unus Baronum Scaccarii Regii, pro tribunali ſedens apud Caſtrum Eborac. ſeptimana aſſiſarum, Anno Domini (niſi mea me memoria fallat) 1604. publice propalavit, memet, cum aliis quamplurimis, tum præſente, audiente, & diligenter animadvertente, tanti judicis & tam experti (maxime vero in conſuetudinibus hujus regni Borealibus) ſermonem.

little or nothing left to the reſt of the Children, (which caſe is more frequent then the former;) the cuſtom (we ſee) is not void of equitie, when both caſes are equally balanced, and indifferently pondered. Thirdly, not onely that Heir is excluded from a filiall portion which doth enter upon the Lands immediately after his Father's death, but he (12) alſo which is Heir in reverſion is Heir, and being Heir, can have no filiall portion [p]. For in the Writ *de rationabili parte bonorum*, it is contained, that he which demandeth a filiall portion, *nec eſt hæres, nec in vita patris ſui promotus*, as by the ſaid Writ more at large appeareth [q]. Now he that is Heir in reverſion cannot ſay ſo, and therefore can recover no filiall portion, according to the cuſtom of the Countrey: otherwiſe if he ſhould recover a portion, and the Land afterward, the finall intent of the cuſtom ſhould ſuffer prejudice, which would that the Lands and goods ſhould not goe both one way, but the one to the Heir, and the other to the reſt of the Children. And yet the caſe may fall out very hard with the Heir in reverſion. For what if he ſhould die in the mean time, before he could lawfully enter to thoſe lands, which be his onely reverſion, and ſo reap no benefit either of his Father's Lands or goods? Howſoever it ſhall fall out, he muſt be content with his lot: and though not he, yet his ſhall enjoy the land at the time appointed [r]. Fourthly, albeit (13) the Heir hold lands by deed or feoffment in morgage, or with clauſe of redemption, that is to ſay, upon condition that if the feoffor pay unto him a ſumme of mony at a certain day, that then the feoffor may re-enter, and the deed or grant to be void, &c. yet nevertheleſs in the mean time, untill the condition be performed, and the Land redeemed, if he ſhould demand any filiall portion, he is barred, becauſe as yet he is Heir to the deceaſed †. But if the Lands ſhould be redeemed, and the mony ſatisfied, then it is thought that he may recover a filiall portion; becauſe then he is not Heir to the deceaſed, nor the advancement certain made by the Father in his life-time [t]. Likewiſe if a man purchaſe Lands in fee, and by will deviſe the ſame to his eldeſt Son, and to the Heirs of his body, and for default of ſuch iſſue to his younger Son, and to the Heirs of his body, &c. in this caſe the eldeſt Son is not barred from the recovery of a filiall portion, as Heir to the deceaſed; becauſe he is not as Heir to his Father according to the courſe of the Common Law, but according to his Father's Will ‖. But whether this deviſe ſhall bar him as an advancement, or as a Legacy intended to be given or bequeathed in lieu and ſatisfaction of his filiall portion, may be a queſtion; whereof partly heretofore, and partly hereafter. Note alſo, that if the Child ſhould (14) have any copy-hold Land after his Father's death, in this caſe he is not reputed his Father's Heir to the effect aforeſaid, and ſo not barred from the recovery of a filiall portion, due by the generall cuſtom of the ſaid Province [v].

[p] Huc facit quod traditur in Relationibus D.Dyer, fol. 124. plac. 38.

[q] Fitzh.Nat.Bre. fol. 122.Br.de Rationab. parte bonor.

[r] Vide Dyer ubi ſup.

† De hac q. conſului D.Tho. Heſcoth militem, Juriſconſulrum (dum vixit) diſertiſſimum, & à conſiliis Regiæ Majeſtati in hiſce partibus Borealibus inter alios unum, nec illo Honore indignum; cujus tandem, poſt maturam quidem deliberationem, opinio talis erat qualis hic à nobis citatur; ſane (ſi quid ego ſentiam) æquitate plena, & rationi conſona.

[t] Idem D. Th. Heſcoth.

‖ Perkins fol. 109. n. 569.

[v] Ita nonnunquam à non paucis, quorum non eſt obſcura fama, Juriſconſultis accepi.

Concerning the ſecond limitation, which is, *That the Child advanced or preferred by his Father in his life-time cannot challenge a filiall portion*

portion of his goods: For the better underſtanding of this limitation, it may be demanded, (15) what manner of preferment or advancement that is which doth debar the Child from a filiall portion. This queſtion is much more eaſily propounded then anſwered; for that I do not find it defined or deſcribed by any writer, either Civill or Temporall: and conſidering the varieties of opinions and diverſities of judgements in this matter, it is impoſſible to make an abſolute definition thereof, and very difficult to make a true deſcription. Howbeit I have adventured in a rude kind of delineation (and as it were with a pencill without any colours) to draw an obſcure form and ſhape thereof. This then (in my conceit) may be termed an advancement or preferment whereby the Child is excluded from a filiall portion, whenas (16) the Father in his life-time hath beſtowed upon his Child a competent portion whereon to live. This obſcure picture, that it may be the better perceived, ſtandeth in need of an explanation or expoſition; for the which I muſt acknowledge my ſelf to be indebted not onely to the Profeſſours of the Civill Law, but alſo to them of the Temporall, and rather to obſervation then to reading, the matter it ſelf being rather over-ruled by cuſtom, then ſubject to rules of written Law. The (17) explanation is this: Firſt, where a preferment is ſaid to be that [*which the Father beſtoweth*,] it is to be noted, that if (18) another then the Father beſtow any preferment or advancement, though never ſo much, this preferment by another is no bar to the Child, from the recovery of his filiall portion of his Father's goods [x]; much leſs where the Child hath advanced his eſtate by his own induſtry. Secondly, where it is ſaid [*upon his Child*,] it is to be obſerved, that if the Father beſtow any thing upon (19) another for his Child's ſake, or for the good of his Child, nevertheleſs this is no ſuch preferment as will hinder the Child of his filiall portion. And therefore if the father beſtow any thing upon a man of trade, to take his Son for an Apprentice, and to teach him his myſtery, this is no advancement to the effect aforeſaid [y]. Or if he beſtow any thing upon a Schoolmaſter or Tutor, in the Univerſities of *Oxford* or *Cambridge*, for the increaſe of his knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the Child of a filiall portion [z]. No more is it, if the Father buy the advowſon (20) of an Eccleſiaſticall benefice or dignity, and afterwards preſent his Son thereto. Or if the Son be, (21) much indebted, and the Father diſcharge the debt; yet I hold this not to be a preferment [a]. But if the Father beſtow (22) a competent portion with his Daughter in marriage, upon him that ſhall marry her, this, without queſtion, is ſuch an advancement as will bar her from the demand of a filiall portion [b]. And ſo it is if the Father be at charges to buy a Ward, and doth match him in marriage with his Daughter: this is an advancement whereby the Daughter cannot claim any filiall portion, though the Father doth not beſtow any thing elſe upon her [c].

[x] Claudius Battandier Tract. de legitima, c. 12. n. 31. L. ſcimus. § repletionem, & Authen. Noviſſim. C. de inoff. Teſtam.

[y] Arg. L. Omnino. 6. § imputari. C. de inoff. teſta. L. 3. § ultim. ff. de muneribus. Iſtud enim non eſt tranſmiſſibile, & ideo non computatur in legitimam. Claud. ubi ſup. n. 19, 20, 21, 22.

[z] d. L. 3. § ultim. de Munerib. L. ultim. C. de Collat. Claud. Battand. d. c. 12. n. 19. &c.

[a] Claud. Battandier d. c. 12. n. 28. L. Liber. C. de poſtlim. reverſ. ubi tamen diſtinguitur.

[b] L. quoniam. Novel. C. de inoffi. teſtam. Claud. in d. Tract. c. 1. n. 6.

[c] Ita à Legum Anglicarum peritis ſæpe traditum agnoſco, quos de hac qu. conſului.

What

What if the Father buy an office, (23) and beſtow it upon his Son? whether is this a preferment to bar him of his portion? It ſeemeth to be no bar thereunto [d]. Thirdly, where it is ſaid [*in the life-time of the Father,*] we are to underſtand, that though the Father by (24) his laſt Will and Teſtament do bequeath any Legacy to his Child in lieu and ſatisfaction of his filiall portion; yet becauſe this was no advancement to the Child whilſt the Father lived, he is not ſo barred from the recovery of a filiall portion hereby, but that he may refuſe or wave the Legacy bequeathed in his Father's Will, and recover a filiall portion, due according to the cuſtom of the Countrey.*. Howbeit if the Father in his life-time beſtow (25) a Leaſe upon his Child, or grant unto him an annuity for life out of his Lands, yet in ſuch manner as the Child ſhall not reap any benefit thereby, ſo long as the Father liveth, but after his death; this is holden for a preferment or an advancement [f], becauſe it was aſſured unto him in his Father's life-time. Nor is this caſe contrary to the former; for the Child had no aſſurance of his Legacy untill his Father was dead, becauſe he might have revoked the ſame at any time whilſt he lived; which he could not doe in the other caſe. Fourthly, where it is ſaid [*a competent Portion,*] this word (26) *Competent* ſignifieth equall, or not far inferiour to that quantity, which otherwiſe, according to the cuſtom of that Province, ſhould fall to be due to the Child, after the rate and proportion of the Father's eſtate, at that time when he doth beſtow any ſuch thing upon his Child: for the ſame being equall, or not much under the rate which ſhould belong to the Child by the cuſtom aforeſaid, if his Father had then died, ſhall ſtand for a ſufficient preferment and advancement, to exclude him from a filiall portion [g]. For conſidering the equality, or ſmall inequality, betwixt the one and the other, it is to be preſumed, that it was the Father's purpoſe that the one ſhould ſtand in ſtead of the other [h]. Inſomuch that if the Father after this preferment ſhall live many years, and (27) encreaſe his ſubſtance, yet I think that the Father's former gift would bar the Child from recovery of any farther filiall portion: and the reaſon is, becauſe as the Father did grow richer, (in which caſe the Son's preferment ſhould be leſs,) ſo it might fall out that the Father might have grown poorer, and then the Son's preferment ſhould have been more then otherwiſe it would by the cuſtom of the Country. So that the Father's gift being at the firſt competent, in regard of his eſtate at that preſent, the ſame is not made effectuall or ineffectuall by the increaſe or decreaſe of his future eſtate. But if the Father's gift were (28) not competent, or far under the rate of that which otherwiſe ſhould belong to the Child by the cuſtom; as for the purpoſe, if the Father ſhould give his Child five pounds, to put in his purſe or beſtow at his pleaſure, whereas otherwiſe his filiall portion would extend to divers hundreds; I do not hold this gift of the Father's to be ſuch an advancement as will exclude the Child from his filiall portion [i], neither in the conſtruction of Law, nor in the intention

[d] d. l. 3. § ultim. ff. de Muneribus. Claud. ubi ſupra.

* Supra hoc ipſo §. in princ.

[f] Ita communiter traditur à Noſtratibus utriuſque fori cauſidicis, quibuſcum ſæpiſſ. de hac re ſermonem habui.

[g] De modicis non eſt curandum. L. ſcio cum. gloſſ. ibidem de reſt. in integrum. ff.

[h] Æqualitas ſervanda, & Oxonium petit æquales.

[i] Quod enim ex mera patris liberalitate proficiſcitur, non debet computari in legitimam, quia animo donandi id feciſſe præſumitur. L. Liber. C. de poſtlimin. reverſis. Clar. d. Tract. c. 11. n. 28.

of the Father; and that it is rather to be termed a meer benevolence, then a preferment or advancement excluſive of a filiall portion: and if the Son have deſerved a good turn at his Father's hands, this is no advancement, but a recompence of that which was formerly deſerved [k]. By the word (29) [*Portion*] I underſtand not onely a ſum of money, or part of the Father's goods and chattels, but alſo lands and annuities, beſtowed by the Father upon his Son. Finally, by theſe words [*whereon to live,*] it is to be collected, that if the Father beſtow any thing upon his Child to (30) any other end, as money in his purſe to ſpend amongſt his equals, or to buy him ſutes of apparell, or books, or armour for the ſervice of his Countrey; yet this (as I take it) is not to be holden for an advancement, though peradventure the ſums of mony given for theſe particular ends were not very much inferiour to that which otherwiſe might belong to the Child for his filiall portion according to the cuſtom, and otherwiſe would have been taken for an advancement [l]. For that is properly (31) called *Patrimonium*, or *Patris munus*, which the Father is bound unto by the Law or inſtinct of nature towards his Son, which is, to provide ſome competent thing for the maintenance of his Child, whereby he may be the better enabled to live after his Father's death [m].

And as there is *Patrimonium*, ſo there is *Matrimonium*; the definition whereof is, *viri & fœminæ conjunctio, individuam vitæ conſuetudinem continens*, the joyning together of man and woman in an unſeparable ſociety of life. But the true (32) Etymologie of the word is, *Matris munus*, that is, the Mother's duty, whereunto ſhe is bound by the Law of nature, and is or ought to be exerciſed in the nouriſhing of her Children, whilſt they be young and under her government, like Chickens whilſt they be under the Hen's wing [n]. Anſwerable to this *Matrimonium*, or *Matris munus*, is *Patrimonium*, or *Patris munus*, the Father's duty, which is or ought to be exerciſed in providing of ſome competent portion for his Children, whereby to live after they ceaſe to be kept any longer under their Mother's wings, and do fly abroad into the world to ſhift for themſelves. And that gift of the Father which is moſt proportionable hereunto, is moſt worthy (in mine opinion) to be adjudged a preferment, ſuch as will exclude the Child from a filiall portion after his death.

But now ariſeth a queſtion not to be pretermitted: What if the thing which the Father beſtoweth upon the Child be ſo indifferent betwixt competent and incompetent, that it may be juſtly doubted whether the ſame were *Patrimonium*, and ſo ſtand for an advancement, or a meer benevolence, over and beſides the which he might expect a filiall portion? Now whether (33) may the Child caſt in that gift of the Father, and ſo recover an equall portion with the reſt of his brethren and ſiſters, yea or nay? It ſeemeth at the firſt that he may. For if a man ſeiſed of thirty acres of Land in fee-ſimple have iſſue two Daughters, and giveth with one of them in marriage ten acres of the ſame Land in franck marriage, and dieth ſeiſed of the other twenty acres, ſhe that is thus married may (if ſhe will) have part of the twenty acres whereof her Father

[k] Quo caſu non computatur in legitimam ſive filialem portionem.

[l] Quod ſtudii cauſa, vel pro libris, aut armis, pater impendit, & jure Civili quicquid non eſt tranſmiſſibile, non imputatur in legitimam, quam nos filialem portionem appellare ſolemus.

[m] De ſignificatione iſtius vocabuli, late Rebuff. & alii in c. Rei. ff. de verb. ſignif.

[n] Summa Hoſtienſ. § Matrimonium. verſic. unde dicatur. de ſponſal. Panor. in c. 2. de converſ. fidel. ex. n. 2. Præpoſ. in Rub. de ſponſal. extr. n. 7.

ther died ſeiſed: but then ſhe muſt put her Land given in franck marriage in *Hotchpot*, (as our temporall Lawyers term it,) that is to ſay, ſhe muſt refuſe to take the ſole profits of the Land given in franck marriage, and ſuffer the Land to be commixed and mingled together with the other Land, whereof her Father died ſeiſed, ſo that an equall diviſion be made of the whole, betwixt her and her ſiſter; and thus, for her ten acres, ſhe ſhall have fifteen, whereas otherwiſe, her ſiſter ſhall have the twenty acres of which their Father died ſeiſed [o]. And as in Lands, ſo in goods, which is alſo agreeable to the Civill Law [p]. And I have ſeen it ſometimes ſo obſerved by the conſent of the Children not advanced, being then of lawfull years: but I have not known it at any time ſo over-ruled by Law, without their conſents. And therefore I do conclude, that, conſidering the ſtrictneſs of the Writ *De rationabili parte bonorum*, this gift of the Father ſhall either be found to be a preferment, or not: if ſo, then is the Child excluded from recovery of a filiall portion: if otherwiſe, then he may recover the ſame according to the cuſtom of this Province of *York*, as in the ſaid writ is contained [q]. And thus much for this diſcourſe of filiall portions due to Children within the Province of *York*: wherein nevertheleſs I do willingly ſubmit my opinion, to be cenſured by the judgment of the better learned, and more experienced therein, as I do in all the reſt of this Book.

[o] *Terms of Law*, verb. *Hotchpot*.

[p] Ut per totum tit. de Collac. & per Vitalem Nemauſenſem, in Tract. inſigni de Collationibus, & Clau. Battandier Tract. de legitima, c. x.

[q] Hoc enim nominatim in d. Brevi exprimitur; viz. Cum ſecundum conſuetudinem communiter obtentam, pueri poſt mortem patrum ſuorum, qui eorum hæredes non ſunt, nec in vita patrum ſuorum promoti fuerunt, &c. Fitz. Nat. Bre. fol. 121.

In

In what manner

TESTAMENTS OR LAST WILLS

Are to be made.

The Fourth Part.

Sect. I. Of the Forms of Teſtaments.

1. *So many ſeveral Forms of Teſtaments, as there be kinds.*
2. *Of Teſtamentary Forms, ſome be General, ſome Particular.*
3. *The General Form of Teſtaments is twofold, Eſſential, and Accidental.*

HEre followeth the Fourth principal Part of this Teſtamentary Treatiſe; wherein I undertook to ſhew how, or in what manner Teſtaments or Laſt Wills, may or ought to be made. For performance whereof, I thought it convenient, firſt to deliver certain Advertiſements, and then to proceed.

The † 1 firſt Advertiſement is this, That as there be divers kinds of Teſtaments or Laſt Wills, (whereof heretofore [a]) ſo there be divers Forms of Teſtaments or Laſt Wills; for every kind hath his ſeveral Form, and every kind differeth from another by his Form [b].

The † 2 next Advertiſement is this, That albeit every particular kind of Teſtament have his proper Form peculiar to it ſelf [c]; nevertheleſs, they have alſo General Forms common to them all [d].

Wherefore, before I ſpeak of thoſe particular Forms, order requireth that I ſpeak of the General.

Of † 3 which General Forms, ſome do reſpect the *Subſtance or inward Eſſence of the Teſtament*, whereby that is made to be, which was not [e]; and ſome do reſpect the *outward Appearance or Proof of the Teſtament*, whereby that is made to appear; which otherwiſe, though it were,

a Supra 1. Part. § 7, 8, 9, &c.

b L. Julianus § ſi quis ad exhibend. ff.

c Supra 1 part. § 7, 8, &c. & infra eadem part. § 22. cum relig. uſque ad finem.

d Ut infra eod. § & § prox.

e Bar. & Jaſ. in L. nemo ff. de leg. 1.

f Olden. de action. claſſ. 5. in prin. ubi tenet contra Bar. & alios, ſolennitatem teſtamentariam non eſſe de forma ſubſtantiali ſeu eſſentiali, ſed forma probatoria. Cujus opinio haud dubiè vera eſt, ubi ſolennitas non eſt de neceſſitate ejuſdem, ut hic in Anglia. Covar. in c. cùm eſſes, de teſta. extr. n. 8. Minſing. in § ſed cum paulatim. Inſtit. de teſta. ordin. n. 4.

ſhould not ſeem to be f. For not appearing, it is (in conſtruction of Law) as if it were not. *Idem eſt in jure, non eſſe, & non apparere* g.

g Vel non eſſe & non apparere, paria ſunt. Vel idem judicatur, de eo quod non eſt, & quòd non apparet. Rebuff. in L. Urbana. ff. de verb. ſignif.

Sect. II. Of the General Subſtantial Form of every Teſtament.

1. *The Eſſential Form common to every Teſtament, is the naming of an Executor.*
2. *What it is to appoint an Executor.*
3. *The naming of an Executor is ſaid to be the Head of the Teſtament.*
4. *The naming of an Executor is alſo ſaid to be the Foundation of the Teſtament.*
5. *No Will properly termed a Teſtament, wherein no Executor is named, albeit other Legacies be left therein.*
6. *The effect of dying without, or with an Executor.*
7. *An occaſion of further conſideration concerning the making of an Executor.*

a L. 1. de hæred. Inſtit. L. 1. de vulg. ſub. L. hæredes palam de teſtam. ff. nec obſtat quod jus civile mentionem faciat de hærede, non de executore. Nam executores quales paſſim conſtitutos videmus in Anglia, ex omni fere parte convenire cum iis, quos (nomen tantum ſi excipias) civile jus appellat hæredes compertum eſt, ita, ut executor hujuſmodi meritò vice hæres dici debeat. Quinimo & legiſtæ, & canoniſtæ omnes, illum pro hærede agnoſcunt executorem, qui nullo alio inſtituto hærede deputatus eſt ad diſtribuendum bona defuncti in pios uſus, Bar. in L. nulli. C. de Epiſcopis & Cler. Bald. in Authon. Licet. C. de Natu. lib. in princ. Zaſ. in L. precibus de vulg. ſub Ripa. in L. filioſa. de leg. 1. n. 21. ff. Panor. & Covar. in c. cùm tibi de teſta. ext. Lindw. in c. ſtatutum de teſta. lib. 1. provin. conſt. Cant. verb. prius Mantic. de conject. ult. vol. lib. 4. tit. 1. n. 7.

THe General, † 1 Subſtantial, or Eſſential Form, common to every Teſtament, is the naming or appointing of an Executor a, the which alone doth make a Teſtament; and without the which, no Will neither is, neither can be rightly termed a Teſtament b. To † 2 name, or to appoint an Executor, is to place one in the ſtead of the Teſtator, who may enter to the Teſtators Goods and Chattels, and who hath Action againſt the Teſtators Debtors, and who may diſpoſe of the ſame Goods and Chattels, towards the payment of the Teſtators Debts, and performance of his Will c; which if he neglect to do, he may be convented by the ſaid Creditors, and Legataries, ſo long as he hath Aſſets in his hand d.

This † 3 naming or appointing of an Executor, is ſaid to be the head of the Teſtament e. And as the body is dead, which lacketh a head, ſo the Teſtament is, as it were, dead, wherein no Executor is appoint-

b L. quod per manus, de jure cod. Bar. & Jaſ. in d. L. nemo de leg. 1. ff. Id ipſum Jaſ. in Rub. de leg. 1. qua etiam in re conſpirant jura hujus regni, ut per Brook his verbis; Alias citatis, & nunc denuo citandis. Nota per lez doctors del civil ley, & ſerjants del common ley, ſi home fait ſon teſtament, & noſme nuls executors, ceo neſt teſtament, &c. Et alibi per Plowd. ſub hac verborum forma. Sans teſtament home ne ſerra executor. Brook tit. execut. 20. Plowd. in caſ. inter Greisbrook & Fox, fol. 276. b. c Sichard. in Rub. de hæred. Inſtit. C. Terms of Law, verb. execut. d Terms of Law, verb. execut. & latius infra part. 6. § 3. e § ante Inſtit. de lega.

ed f.

ed [f]. It is also said † 4 to be the Foundation of the Testament [g], wherefore as no building can stand without a Foundation, so no Testament can stand without the appointing of an Executor [h], neither can be properly named a *Testament*. And † 5 although never so many Legacies, or Devises be given, all those Legacies and Devises notwithstanding, such disposition may be called a Codicil, or a Will, or otherwise termed; but certainly a Testament it is not, neither can be properly so named [i]; and therefore † 6 he that made any such disposition, shall be deemed to have died without a Testament [k], and so the Administration of his Goods to be committed to the Widow, or next of kin, as of one dying intestate [l]: Whereas on the contrary, if an Executor be appointed, suppose no other Legacy be left, or Devise made, yet such Disposition both is, and may be lawfully and properly said to be a Testament [m], whether the same *be solemn or unsolemn, written or nuncupative, priviledged or unpriviledged* [n]; and the person so disposing is called a *Testator* [o]. And in this case the Ordinary cannot commit the Administration of the dead Mans goods, as of one that died Intestate, the Executor being able and willing to undertake the Execution of the Testament [p].

Seeing † 7 therefore the force and efficacy of making an Executor is such, as without the which, no Will or Disposition is, or deserveth to be termed a *Testament*, and without the which, the party deceased shall be deemed to have died Intestate, notwithstanding the multitude of other Legacies or Devises; and so Administration of the goods to be committed, as is aforesaid. It shall be therefore behoveful to step a little further into the consideration of this matter of making an Executor, as the most excellent part and foundation of every Testament; and to shew after how many sorts an Executor may be made [q], and what are the different effects of every several sort or manner of appointing an Executor [r].

[f] § Imprimis, Instit. de fidei com. hæred.
[g] D. § ante instit. de legat.
[h] D. L. quod per manus de jure codicil. ff. & D D. Ibidem. Jul. Clar. § Testm. q 5. n. 2. Adde quod Testator & Executor, sunt Relativa.
[i] Quippe legata sunt accidentia quæ adesse & abesse possunt, sine subjecti (id est, testamenti) interitu. Jas. in Rub. de leg. 1. ff. Vasq. de success. crea. § 17.
[k] D. L. quod per manus jure codicil. ff. Instit. de hæred. quæ ad intestat.
[l] Stat. H. 8. an. 21. c. 5.
[m] L. 1 §. qui neque de hæred. Instit. ff.
[n] Supra part. 1. § 10.
[o] Stat. Westm. 2. c. 23. an. 13 Ed. 1. stat. Ed. 3. an. 4. c. 1. & an. 25 c. 5. stat. 4. Brook & Fitzh. Abridg. tit. execut. & tit. testam. quibus in locis cum sexcentis similibus clarè con- Infra part. 7. § 19.

stat, testatorem & executorem testamentarium relativorum naturam sapere. [p]
[q] Infra § prox. [r] Infra ead. part. § 4.

Sect. III. After how many sorts an Executor may be made.

1. *An Executor may be appointed simply or conditionally, from or until a time, directly or indirectly, universally or particularly, in the first degree, second, third, &c. And one alone may be appointed Executor or many.*
2. *After how many sorts an Executor may be made, after so many may a Legacy or Devise be given.*

THe word Executor taken in the largest sense falls under a threefold acceptation: For there is first, *Executor a lege constitutus*, and that is the Ordinary of the Diocess. Secondly, *Executor a Testatore*

conſtitutus, and that is the *Executor Teſtamentarius*. And thirdly, There is *Executor ab Epiſcopo conſtitutus*; and that is, the *Executor dativus*, who is called an *Adminiſtrator to an Inteſtate*. By the Civil Law, this *Executor Teſtamentarius*, or *Hæres*, doth ſucceed in *Univerſum jus quod defunctus habuit tempore mortis* [a].

a L. 1. Cod. de hæredibus.

An † 1 Executor may be appointed after divers manners, eſpecially after theſe following. Firſt, Either *ſimply* [b], *or conditionally* [c]: Secondly, Either *from a certain time, or to a certain time* [d]: Thirdly, Either *univerſally or particularly* [e]: Fourthly, Either *in the firſt degree, or in the ſecond degree, or in the third degree, or in the fourth, &c.* [f]. And laſt of all, Either *one* may be appointed ſole Executor, or *divers* may be appointed Executors together [g], of which, I mean to treat ſeverally. But by the way I would have the Reader to obſerve, that † 2 as an Executor may be made diverſly; ſo a Legacy may be given, or a Deviſe made accordingly, that is to ſay, Simply or conditionally, from a time or for a time, univerſally or particularly, in the firſt, ſecond, or third degree, *&c.* and to one or many; which order of ſemblance or imitation, if the diligent Reader ſhall note (which thing is very eaſie to be performed: For that which is ſaid of the one, may alſo be ſaid of the other, in every reſpect almoſt, ſaving where I have noted the difference) he ſhall reap two benefits in one reading, and eaſe me of double labor.

b Infra eod. part. § 4.
c Infra eod. part. § 5.
d Infra eod. part. § 17.
e Infra eod. part. § 18.
f Infra eod. part. § 19.
g Infra eod. part. § 20.

3. When the King is made Executor, he doth appoint certain perſons to officiate the Execution of the Will; againſt whom ſuch as have cauſe of Action, may bring their Suits, and appoint others to take their account [h]. So *Katherine*, Queen Dowager of *England*, Mother of *Henry* the Sixth, who died 2 *Jan.* 1436. made her Will, and thereof appointed *Henry* the Sixth, her ſole Executor. Whereupon the King appointed *Robert Rolleſton*, and others, to execute the ſaid Will, by the overſight of the Cardinal, the Duke of *Gloceſter*, and the Biſhop of *Lincoln*, or any two of them, unto whom they were to account [i].

h Rot. Parl. 15. H. 6. n. 32.
i Inſt. Part. 4. ut Prærogat.

4. And as the Aſſignation of an Executor may be various, ſo the power of an Executor may be limitted, qualified, and divided. Firſt, Really, as if he makes *A.* his Executor for his Plate and Houſhold-ſtuff, *B.* his Executor for his Sheep and Cattle, *C.* his Executor for his Leaſes, Statutes, *D.* for his Debts due unto him. Secondly, Locally, as if he makes *A.* for his Goods in *London*, *B.* for his Goods in *Middleſex*, or in any other County. Thirdly, Temporally, as he may make his Wife Executrix during her life, or during the minority of his Son, or ſo long time as ſhe ſhall continue Widow [k].

k 29 H. 8. 3. Dyer. 32 H. 8. Brok. pl. 155. Pl. Com. Greisb. & Fox.

Sect. IV. Of a pure or ſimple Aſſignation of an Executor.

1. *The chief points conſiderable about the ſimple Aſſignation of an Executor.*

2. *What*

2. *What is a pure or simple Assignation of an Executor.*
3. *Divers Examples of a simple appointment of an Executor.*
4. *Whether is he understood to be made Executor, to whom the Testator doth give* all, *or the* residue *of his goods.*
5. *It is not always needful to express this word* Executor, *in making of an Executor, namely, when the Testators meaning is known.*
6. *Other Examples of the former Conclusion.*
7. *The General Legatary is not always understood to be Executor.*
8. *What if the words be indifferent, either to make a Testament or a Codicil.*
9. *An Executor may be made, either by the proper motion of the Testator, or at the Interrogation of another.*
10. *The Testator must have a firm purpose of making his Testament, otherwise words are of no force.*
11. *It skilleth not of words, so that the meaning appear, neither in what part of the Testament the Executor be appointed.*
12. *Of the effect of a pure or simple nomination of an Executor.*
13. *Certain Cases wherein the mention of a Condition doth not make the Disposition conditional.*
14. *Whether impossible or unhoneſt Conditions, do make the Disposition conditional.*
15. *Whether necessary Conditions make the Disposition conditional.*
16. *Conditions referred to that which is past, or present, are not properly Conditions.*
17. *Conditions necessarily understood, do not make the Disposition conditional.*
18. *The Application of that which hath been spoken of the Assignation of an Executor to a Legacy or Devise.*
19. *Certain Cases of the Devise of Lands, wherein the meaning of the Devisor is preferred before the propriety of words.*
20. *The different effects of a simple Assignation of an Executor, and a simple Legacy.*
21. *A Legatary may not of his own authority take his Legacy, and what is the reason.*
22. *What remedy a Legatary hath for the obtaining of his Legacy.*
23. *Certain Cases wherein the Legatary may of his own authority apprehend his Legacy.*

CConcerning † 1 the pure and simple making of an Executor, I thought good to remember these points, *viz. What it is, in what form of words it may be made, what is the effect thereof*; and finally, *how a simple nomination of an Executor, and a simple Legacy or Devise do agree or differ.*

A † 2 simple nomination or appointing of an Executor is, when the Testator maketh his Executor without any Condition [a]; as if the † 3 Testator say, I make *A. B.* my Executor; or thus, I institute *A. B.* my Executor; or thus, I will that *A. B.* be my Executor; or thus, I desire *A. B.* to be my Executor; or thus,

[a] § Hæres. Instit. de hæred. Instit. & Mirsing. ibid. Graff, Thesaur. com. op. § legatum, q. 43, n. 2.

A. B. ſhall be my Executor; or thus, let *A. B.* be my Executor[b]: For the Law regardeth not ſo much the words, as the meaning of the Teſtator[c]. And therefore if the Teſtator ſay, I commit all my Goods to the Diſpoſition of *A. B.* it is in effect, as if he ſay, I make him my Executor[d]; or, if the Teſtator ſay, I will that *A. B.* ſhall diſpoſe my Goods which be in his cuſtody, he is thereby made Executor of thoſe parcels of Goods[e]. So it is if the Teſtator ſay, I commit my Soul, and all my Goods to the hands or diſpoſition of *A. B*[f]. Or I make *A. B.* Lord[g] of all my Goods, or, I make my Wife Lady of all my Goods[h]; or, I leave all my Goods to *A. B*[i]. Or, I make *A. B.* Legatary of all my Goods[k]; or, I leave † 4 the reſidue of all my Goods to *A. B*[l]. For in thoſe Caſes, he to whom all or the reſidue is bequeathed, is thereby underſtood to be made Executor[m]. And this I ſuppoſe to be true, when it doth ſufficiently appear by other means alſo, to be the meaning of the Teſtator not to die inteſtate, but that he to whom all or the reſidue is bequeathed, ſhould immediately, by vertue of the Will, enter to all the Teſtators Goods, (and paying his Debts and Legacies) retain the reſidue to himſelf[n]. For † 5 it is not always neceſſary to expreſs this word (*Executor*) in making of an Executor[o], neither hath every Teſtator skill ſo to do[p]; wherefore it is ſufficient, if the Teſtators meaning do appear by other words of like ſenſe or purpoſe[q]. And † 6 hence it is, that if the Teſtator write after this manner, *In all my Goods movable and immovable, I make* A. B. though the Teſtator do not add Executor, yet it is to be underſtood, and ſupplied; and ſo is in effect, as if the Teſtator had ſaid, *In all my Goods movable and immovable, I make* A. B. *my Executor*[r]. Hence alſo is it, that if the Teſtator ſay, I will that *A. B.* be my Executor, if *C. D.* will not: In this caſe *C. D.* is preſumed to be appointed Executor; and may if he will be admitted to the Executorſhip, and exclude the other Executor[s]. Likewiſe, if the Executor ſuppoſing his Child, Brother, or Kinſman, to be dead, do ſay in his Will; For as much as my Child, Brother, or Kinſman is dead, I make *A. B.* my Executor: In this caſe, if the Child or other perſon whom the Teſtator ſuppoſed to be dead, be alive, he that is named Executor ſhall not be admitted to the Executorſhip, but the Child, Brother, or Kinſman, whom the Teſtator thought to have been dead[t]; for that it is preſumed to have been the meaning of the Teſtator to have made that Child, Brother, or Kinſman his Executor, if he had thought him to have been living, and not the party named[u]. Or if the Teſtator will, that *A. B.* ſhall have

b L. quoniam indignum C. de teſta. & D D. ibidem.
c D. L. quoniam Mantic. de conject. ult. vol. lib. 4. tit. 3. Graſſ. Theſaur. com. op. § Inſtitut. qu. 14.
d Cum tibi de teſta. extr. ſumma Roſella. verb. teſtam. § 1. verſ. quibus verb.
e L. Abridgment des Caſes, edit. Anno Dom. 1599. fol. 175. n. 1.
f Lo. de Ar. Andr. Barba in d. c. cùm tibi. Brook Abridg. tit. executor n. 98.
g L. his verbis ff. de hær. Inſtit.
h Bald. in d. L. his verb.
i Gloſſ. Bar. & Bald. in d. L. his verb. Graſſ. Theſaur. com. op. Inſtit. q. 14. quem velim videas.
k Mantic. de conject. ult. vol. lib. 4. tit. 3. n. 8. Bald. in L. id quod pauperibus. C. de Epiſcopis & cler. n. 1. verb. contrarium, Simo de prætis. lib. 1. de interp. ult. vol. fol. 130. n. 3.
l Panor. in c. Ranutius de teſta ext. n. 3.
m Rationem aſſignat Panor. in d. c. Ranutius. Quia (inquit) juris imperiti neſciunt aprius loqui.
n Quo caſu, nihil refert, ſitne teſtamentum ſolenne, vel non ſolenne. Nam quod quidam volunt verbum (relinquere) adjectum univerſitati bonorum in voluntate minus ſolenni importare fidei commiſſum, non inſtitutionem, actumque valere jure codicillorum, donationiſve cauſa mortis non teſtamenti (ut in apoſtil. ad Panor. in d. c. Ranutius.) Ita eſt intelligendum, quando teſtamentum aliàs non valeret. Bald. L. epiſt. C. de fidei com. n. 4. Sichard. in L. fin. C. de Codicil. n. 4. Covar. in d. c. Ranutius. § 1. n. 3. *o* C. cùm tibi de teſta extr. Brook. tit. exce. n. 98. *p* Panor. in d. c. Ranutius n. 3. *q* L. quoniam indignum. C. de teſta. Mantic. de conject. ult. vol. lib. 4. tit. 3. *r* Paul. Caſtrenſ. & alii in L. errore. C. de teſta. Mantic. de conject. ult. vol. lib. 4. tit. 3. n. 5. *ſ* Jul. Clar. § teſtm. b. 35. n. 2. *t* Sichard. in Rub. de hæred. Inſtit. C. n. 3. *u* Sichard. ubi ſupra per. L. ſi m'r. C. de inof. Teſta. Alex. conſil. 185. lib. 2.

his

his Land in Dale, after the death of his Wife, ſhe ſhall have it for her life [x].

If *A. B.* is next heir at Law to the Deviſor, the Wife by implication ſhall have the Land for her life; but if *A. B.* be a ſtranger to the Deviſor, the Wife ſhall not have it for her life, but it ſhall deſcend to the next heir at Law to the Deviſor, as it hath been adjudged.

But † 7 if on the contrary, it do appear to be the Teſtators meaning, not to make him Executor to whom he doth bequeath his Goods, as when the Teſtator having bequeathed his Goods to one perſon, doth expreſly name another to be his Executor [y]; or if he to whom all is bequeathed, be unable [z] to execute the Teſtament; or if the Teſtator bequeath the reſidue of his Goods, *the Debts diſcharged* [a]. In theſe Caſes the Univerſal Legatary doth ſtill remain Legatary, and is to receive his Legacy at the hands of the Executor or Adminiſtrator.

If the † 8 words be indifferent, either to make an Executor or an Univerſal Legatary; a Teſtament or a Codicil [b], and no circumſtances to or fro, to maintain the one rather then the other, either elſe the circumſtances being indifferent: Although in this caſe the Judge ought rather to pronounce the deceaſed to have made a Teſtament, than a Codicil, and to have left an Executor rather than to have died Inteſtate, in reſpect of the Civil and Eccleſiaſtical Laws [c]. Yet in regard of the Statute, it is more ſafe to commit the Adminiſtration to the Widow, or the next of kin demanding the ſame, for fear of forfeiture of Ten pounds [d], leaſt peradventure the Judge before whom the penalty is to be demanded, ſhall deem the party to have died Inteſtate.

Furthermore, † 9 the Teſtator may lawfully make his Executor, not only of his own accord without interrogation; but alſo at the intreaty or requeſt of another (except in certain Caſes elſwhere declared [e],) and that not only by the words aforeſaid, but by others of like effect [f]. And therefore, if the Teſtator being demanded by another, whether he do make *A. B.* his Executor; do anſwer, yea, or I do, or what elſe, or why not, or whom elſe ſhould I make Executor, or I cannot deny. This is a pure and a ſimple Aſſignation of an Executor [g].

Provided † 10 always in all the Caſes aforeſaid, and in every other like Caſe, that the Teſtator have a firm and conſtant purpoſe and meaning to make his Will, when he uttereth any ſuch words [h], for otherwiſe, if the Teſtator have no meaning to make his Will, although he uſed the moſt plain words that might be deviſed for the making of an Executor, yet (as I ſaid ere while) it were no more a Teſtament or a Will, then a painted Lion is a Lion [i]; for the purpoſe and meaning of the Teſtator is the life and ſoul (as I may term it) of the Teſtament, without the which, the Teſtators words are but wind. If that do not appear, ſuch only words ſhall not be admitted for a Will [k]. For what if the Teſtator ſay in jeſt, I make thee my Executor? What if

[x] Brook. Abridg. tit. deviſe. n. 48, 52. ubi vide.

[y] Bar. in L. his verbis de hæred. Inſtit. ff. cujus opinio communiter approbatur, ait Graſſ. Theſaur. com. op. § inſtitutio q. 14. Berous in c. Ranutius de teſta. extr. n. 20.

[z] Inſtit. de hæred. quæ ab inteſtat. in princ.

[a] Imol. in d. c. Ranutius, n. 8. Berous ibid. 37. Quæ opinio communis eſt teſte Graſſ. d. § inſtit. q. 14. n. 6.

[b] Detunctus quando cenſendus eſt voluiſſe codicillari, vel teſtari Pulchrè Eald. in L. filii. C. familiæ Herciſcund. ſed plenius Mantic. de conject. ult. vol. lib. 2. tit. 3.

[c] Legiſta. in L. verbis civilibus de vulg. ſub. ff. Canoniſtæ in c. Cum tibi de teſta. extr. Mantic. de conject. ult. vol. lib. 2. tit. 3. n. 12.

[d] Stat. H. 8. an. 21. c. 5.

[e] Supr. part. 2. § 26.

[f] Mantic. de conj. & ult. vol. lib. 4. tit. 3.

[g] Ripa. Alcia. Zanus, & alii Doctores in L. 1. § ſi quis ita. de verbis. ob. ff. Clar. § teſtm. q. 37.

[h] Mantic. de conject. ult. vol. lib. 4. tit. 4. in prin. ſupr. ff. de mil. teſt. § pone

[i] Supra part. 1. § 3. n. 25. [k] L. divus L. Lucius. 1. part. § 3. verb. ſententia. Inſtit. de mil. teſtam. Mantic. de conject. ult. vol. lib. 2. tit. 4.

he

he said so for fear? What if he were overcome with drink? Therefore it is not enough to prove the Testators words, unless it be proved that the Testator had *animum testandi* which how it is proved, is elswhere declared [l].

Note also, that as it skilleth not by what words the Executor is appointed; so † 11 it is not material in what part of the Testament he be appointed, whether in the beginning, or in the midst, or ending [m].

The † 12 effect of a pure and simple Assignation of an Executor is this, That the Executor may immediately after the death of the Testator, undertake the Executorship, and enter upon the Testators Goods and Chattels [n]; whereas on the contrary, the effect of a Conditional Assignation, doth suspend his Admission and Execution of the Testament, as afterwards more fully doth appear [o].

And † 13 here note, That if the Testator say, *I make* A. B. *my Executor according to the conditions afterwards expressed*; if the Testator afterwards express no Conditions, it is in effect, as if the Testator had made him his Executor simply [p]. And so he may enter upon the Testators Goods presently after his death; for the Testator in not expressing any Conditions, is presumed to have altered and revoked his purpose concerning the adding of Conditions [q]; and consequently, that he would have the appointment of the Executor to be pure and simple. Howbeit, if the Testator making his Executor upon Conditions, to be then expressed afterwards, in the mean time, whiles he is in making his Will, be suddenly prevented by death, or insanity of mind, that he cannot express those Conditions, according to his purpose and determination: In this Case the Assignation is void, and he which is so appointed Executor is not to be admitted to the Executorship [r]. Likewise, if the Testator do make his Executor after this manner. *I make* A. B. *my Executor*; if I shall express any Conditions, in this Case no Conditions being expressed, he that is so appointed, ought not to be admitted [s].

It is † 14 also to be noted, That that Assignation of an Executor is in effect pure and simple, where the Condition is impossible or unhonest; for such Conditions are reputed, as not written, but omitted [t], and so the Executor, without accomplishment of any such Condition, is forthwith to be admitted to the Executorship, except in some Cases, as hereafter is declared [u].

Furthermore, † 15 when it is certain, That the Condition will necessarily follow or be extant; the appointment of the Executor made under such Condition, is reputed pure and simple; as if the Testator make *A. B.* his Executor, if the Sun shall rise the next day [x]; unless the time when the Condition will be extant, be uncertain, as I make *A. B.* my Executor, if my Son shall die: For though it be most certain that he will die, yet nothing more uncertain then the time when; and therefore the Assignation is in effect conditional [y].

And the like may be said, † 16 When the Condition is referred to that which is past, or present, as if the Testator say, I make *A. B.* my Executor,

[l] Infra 1. part. § 13.

[m] § ante Instit. de lega. Grass. Thesaur. com. op. § Instit. q. 11.

[n] Wesemb. in tit. de acquir. hared. ff. & in tit. de hared. Instit. Et hec verum est etiam ante probationem testamenti. Plowd. lib. 1. in Cas. int. Greisbrook. & Fox. Cagnol. in L. si precibus. C. de impub. & aliis, sub. n. 276, 277, 278.

[o] Infra ead. part. § 6, 7.

[p] L. pen. C. de institut. & sub.

[q] DD. in d. L. pen.

[r] L. si quis destinaverat alias, si is qui ff. de testam. Paul. de Castr. in L. jubemus, C. de testam. & latius infra part. 7. § 12.

[s] Dec. & alii. in d. L. Pen. C. de Instit. & sub.

[t] § Impossibilis Instit. de hared. instituend. L. obtinuit. de cond. & demon. L. conditiones de condit. Instit. ff.

[u] Infra eadem part. § 6, 7.

[x] L. si pupillus, § sub conditione, ff. de novac. Alex. consil. 59. n. 14. vol. 1.

[y] Sichard. in Rub. de condic. Instit. C. & fusius infra eadem § 17. & part. 7. § 23.

Executor, if he be Batchellor of the Civil Law, or if he have been ſtudent in the Univerſity of *Oxford*: For this kind of Condition, is not properly a Condition [z], but rather a final Cauſe, wherefore the Teſtator made his Executor [a]. And although the Teſtator be uncertain, whether the Executor be Batchellor of Law, or have been ſtudent; yet it is certain, in reſpect of the fact it ſelf; and is either true or falſe at that inſtant, when it is made: And ſo the Condition worketh no delay or ſuſpenſion, but is either a good or void Aſſignation at that moment [b].

Finally, (17) That Aſſignation of an Executor is pure and ſimple, when that Condition is expreſſed, which is neceſſarily underſtood [c], as if the Teſtator ſaid, I make *A. B.* my Executor if the Law will [d], or if he will undertake the Executorſhip [e].

That (18) which hath been ſpoken of the making of an Executor (according to my former Advertiſements) may eaſily be applied to a Legacy, *Mutatis mutandis*: Wherefore, as that Nomination or Aſſignation of an Executor is pure and ſimple, which is made without Condition; ſo that Legacy is pure and ſure which is given without Condition.

Secondly, By the like Application it may appear, that it is not material in what Form of words a Legacy be bequeathed; ſo that the Teſtators meaning do appear. Which meaning is to be preferred before the propriety of words [f], and that not only concerning Goods and Chattels, but alſo concerning Lands and Tenements: For further Declaration whereof, I have added theſe Examples following, which I have borrowed out of a little Book, called *The Terms of Law* [g].

First (19) therefore, *If a Man do by his Will deviſe to* A.B. *all his Lands and Tenements. In this caſe not only all his Lands and Tenements, which the Teſtator hath in poſſeſſion, do paſs, but thoſe alſo which he hath in Reverſion by vertue of this word Tenements.*

Item, *If Lands be deviſed to a Man to have to him for evermore, or to have to him, and his Aſſigns: In theſe two Caſes, the Deviſee ſhall have a Fee-ſimple; whereas if it be given by Feoffment in ſuch Terms, the Feoffee hath but an eſtate for his life, for a Deviſe made without expreſs words of Heirs, is good even in Feeſimple.*

Item, *If a Man Deviſe his Land to another, to give or ſell, or do therewith at his pleaſure, and Will this in Feeſimple.*

Item, *A Deviſe made to one, and to his Heirs-males, doth make an Eſtate in Tail; but if ſuch words be put in Deed of Feoffment, it ſhall be taken in Feeſimple, becauſe it doth not appear of what Body the Heirs-males ſhall be begotten.*

Item, *If Lands be given by Deed to* A. B. *and to the Heirs-males of his Body, who hath iſſue a Daughter, which Daughter hath iſſue a Son, and dieth, there the Land ſhall return to the Donor, and the Son of the Daughter ſhall not have it; becauſe he cannot convey himſelf by Heirs-males, for his Mother is a let thereunto. But otherwiſe it is of ſuch a Deviſe given by Will, for there the Son of the Daughter ſhall have it, rather than the Will ſhall be void.*

[z] L. ſi ita ſtipulatus ff. de verb. ob. Bar. in L. 1. de condic. & demon. ff.
[a] Jaſ. in L. ſtichum. de leg. 1. ff.
[b] DD. in d. L. ſi ita ſtipulatus.
[c] L. hæc verba de leg. 1. ff. L. conditiones de cond. & demon. ff.
[d] Mantic. de conject. ult. vol.
[e] Graſſ. Theſaur. com. op. § legatum q. 47.
[f] § noſtra Inſtit. de lega.
[g] Verbo deviſe.

Item, *If one Deviſe to an Infant in his Mothers Womb, it is a good Deviſe, though ſuch a Feoffment, Grant, or Gift be void.*

Item, *If one Will that his Son ſhall have his Land after the death of his Wife, here the Wife of the Deviſor ſhall have the Land firſt, for term of her life. So likewiſe, if a Man Deviſe his Goods to his Wife, and that after the deceaſe of his Wife, his Son and Heir ſhall have the Houſe where the Goods are, there the Son ſhall not have the Houſe, during the life of the Wife: For it is preſumed that his intent was, that his Wife ſhould have the Houſe alſo for term of her life, notwithſtanding it were not deviſed unto her by expreſs words.*

Item, *If a Deviſe of Land be made to* A. B. *and to his Heirs-females of his Body begotten. After the Deviſee hath iſſue a Son and a Daughter, and dieth, here the Daughter ſhall have the Land, and not the Son; howſoever he be the more worthy perſon, and Heir to his Father; but becauſe the Will of the dead perſon is, that the Daughter ſhall have it; therefore Law and Equity would that it ſhould ſo be.*

Hereunto it may be added, That if the Teſtator by his laſt Will Deviſe his Lands to *A. B.* charging him with a payment of a ſum of Money (being as much or peradventure not as much as the Land is worth, for the life of the Legatary or Deviſee.) In this Caſe, he to whom the Land is deviſed, ſhall have an Eſtate of Inheritance, by vertue of the ſaid Will, though there be no mention of Heirs, nor of Aſſigns, nor for ever, nor any other words otherwiſe requiſit in a Deed, without the which, an Eſtate of Inheritance could not paſs; whereby (as alſo by the former Caſes) we may diſcern the difference, and the great preeminence of Wills before Deeds; for in the one, the Law doth reſpect the meaning rather then the words; in the other, the words rather then the meaning [h]. Howbeit, If a Man by his Will Deviſe Land in Fee to one, and if he die without Heir, then to remain to another in Fee. This is a void Remainder, becauſe one Feeſimple cannot depend upon another [i]. And therefore, whereas a Man deviſed Land in *London*, to the Prior and Covent of S. *Bartholomews*; ſo that they pay to the Dean and Chapter of *Pauls* Ten pounds yearly: And if they failed, then their eſtate to ceaſe, and that the Land ſhould remain to the Dean: It was held, that this was a void Remainder [k], becauſe it could not be limited after an Eſtate in Fee. And that the Heir, and not the Dean and Chapter, was to take the advantage in this caſe.

Thirdly, It may appear by that which hath been ſaid of an Executor, that the Legacy is void where the Teſtator hath not *Animum Teſtandi* [l].

Fourthly, That there be divers Conditions which do not make the Legacy conditional [m].

Laſtly, (20) Concerning the effect of the one and the other, albeit otherwiſe the appointing of an Executor, and the bequeathing of a Legacy do agree in divers things; yet in this they do differ greatly; that is to ſay, An Executor ſimply inſtituted, may as ſoon as the Teſtator is dead, enter to the Goods and Chattels of the deceaſed [n]: But a (21) Legatary or Deviſee may not of his own authority take the Legacy, and

[h] L. quoniam Indignum. C. de teſta. Mantic. de conject. ultim. volun. l. 4. tit. 3. Simo. de prætis Tract. de interp. ult. volum. in locis infinitis.

[i] Fulb. paralele, f. 46 b. 19 H. 8. 8.

[k] Fulb. ubi ſupra 29 H. 8. 32.

[l] Infra part. 7. § 13.

[m] Infra § 5, 6.

[n] L. cum hæredes. ff. de acquirend. poſſ. Bar. in L. ex facto ff. de hæred. inſtituend. Cagnol. in L. precibus. C. de imp. & alio ſubſt. n. 275.

and ſerve himſelf, but muſt receive the ſame at the hands of the Executor [o]; the reaſon is, for that the Executor is charged with the payment of all the Teſtators Debts, ſo far as the Goods and Chattels will extend, and the Legacies are not to be paid but of the reſidue, if any thing remain [p]. (22) And the Legatary hath no remedy by the Common Laws of this Land, for any Legacy of Goods to him bequeathed, if the Executor will not deliver the ſame: But it behoveth the Legatary in this Caſe, to take a citation againſt the Executor of the Teſtament, to appear before the Ordinary, or other Eccleſiaſtical Judge, competent to anſwer him in a cauſe of Legacy [q]. Notwithſtanding (23) in ſome Caſes the Legatary may be lawfully poſſeſſed of his own Legacy, without delivery thereof to be made by the Executor: For if there be ſufficient Goods and Chattels, in the hands of the Executor, to pay all the Teſtators Debts and Legacies, and the Legatary is poſſeſſed of the thing bequeathed, at the time of the death of the Teſtator. In this Caſe the Legatary, doubtleſs, by the Civil Law, may ſtill retain the ſame in his own hands [r]; neither is he to deliver the ſame to the Executor, and afterwards to receive the ſame again at his hands [s]; likewiſe, if the Teſtator give Licenſe to the Legatary, to enter to his Legacy. In this Caſe, the Legatary may without the privity or conſent of the Executor, take his Legacy and keep the ſame; ſo that there be ſufficient beſides, to diſcharge the Teſtators Debts [t]. Peradventure alſo, in caſe of ſuch ſufficiency of Goods, a certain ſpecial thing being bequeathed (as the Teſtators riding Horſe, his Books or his Signet) though another perſon then the Executor detain the ame; the Legatary may as well by the Laws of this Realm [u], as by the Civil Law [x], commence Suit againſt the occupier thereof, and re cover the ſame Legacy [y]; unleſs this third perſon were able to juſtifie his poſſeſſion, even againſt the Executor, or againſt the Teſtator himſelf, if he were living; for that is a lawful Bar or Exception againſt the Legatary alſo [z]. But if there be not ſufficient Goods to pay the Teſtators Debts, or if the Legacy conſiſt in quantity, or be general, (as if the Teſtator bequeath Twenty pounds or a Horſe) the Legatary cannot of his own authority take ſo much of the Teſtators Money, or any Horſe, which was the Teſtators [a], without Licenſe given by the Teſtator, or permiſſion of the Executor, nor may bring any Action againſt any third perſon for the ſame Legacy, albeit he poſſeſs all the Teſtators Goods [b]. Finally, If the Legatary be alſo Executor, then may he, if he will, as Legatary, accept the ſame [c]. But, what if it do not appear whether he did accept the ſame as Legatary, or as Executor,

o L. 1 quorum lega ff. L. non dubium, C. de lega. Perkins, tit. teſtament. c. 7. fol. 94. Brook tit. Deviſe, n. 3.

p Perkins ubi ſupra & in tit. Deviſes, (ubi etiam tradit aliam cauſam ſed par. honeſtam fruſtrandi legata & fraudandi teſtatorem.) Aliam rationem aſſignat jus civile, nempe ob detractionem falcidiæ, quæ ratio quam ſit apud nos debilis facile eſt conjicere, quandoquidem nullus eſt falcidiæ locus infra regni noſtri limites.

q Tract. de rep. Angl. l. 3. c. 9. Fitz. Nat. Br. brevi de conſultatione, Brook tit. Deviſe, n. 3. 27. 14. Plowd. in caſ. inter Paramor & Yard. Terms of Law. verb. Deviſe.

r Secin. conſil. 11. vol. 1. Ripa in L. 1. ff. quorum lega. n. 15. Olden. de act. on. claſ. 2. act. 2. fol. 113.

s C. dolo. de reg. jur. 6.

t Jaſ. in L. non dubium, C. de lega.

u Brook. Abridg. tit. Deviſe, n. 630.

x Sichard. in L. 3. C. de lega. n. 16.

y Ratio eſt quia dominium rei legatæ ſtatim poſt mortem Teſtatoris tranſit in legatarium, etiam nondum facta traditione gloſſ. & DD. in § in noſtra. Inſtit. de lega. & in L. à Titio, ff. de fur. *z* L. ſi rem legatam. ff. de excep. & præjudic. *a* Brook tit. Deviſe, § 6. & n. 30. *b* Quod autem diximus jure civili triplicem concedi actionem legatario, pro conſequendo legato. procedit ſpecie relictâ, ſed ſi quantitas, vel genus relinquatur, non competit rei vendicatio, Bar. in L. 1. ff. de leg. 1. Sichard. in L. non dubium, C. de lega, niſi fortè quantitas, non ut quantitas, ſed ut corpus relinquatur, vel niſi genere relicto, facta ſit electio debita, tunc enim idem juris eſt, ipſoque jure tranſit rei dominium, ac ſi legata fuit ſpecies. Angel. Are. & alii in d. § mſtra. Inſtitut. de lega. Vide ſupra part. 1. § 6. in fin. & quæ ibidem annotantur. *c* Sichard. in L. non dubium, C. de lega numb. 13.

whether is it presumed that he did accept the same as Executor, or as Legatary? This Question is elswhere absolved.

Sect. V. Of a Conditional Assignation of an Executor.

1. *The chief Points considerable about the Conditional Assignation of an Executor.*
2. *When the Assignation of the Executor is Conditional.*
3. *By what words the Disposition is made Conditional.*
4. *Of Conditions some be necessary, some impossible, some indifferent or possible.*
5. *What Conditions be necessary.*
6. *Two sorts of necessary Conditions.*
7. *Of impossible Conditions there be divers kinds.*
8. *Impossible by Nature.*
9. *Impossible by Law.*
10. *Impossible in respect of some Persons.*
11. *Impossible, by reason of Contrariety or Perplexity.*
12. *Possible Conditions are those which are indifferent betwixt necessary and impossible.*
13. *Of Possible Conditions, some be arbitrary, some casual, some mixt.*
14. Item, *Of Possible Conditions, some consist in chancing, some in doing, some in giving.*
15. *Of Conditions some are Affirmative, and some Negative.*

CConcerning a (1) Conditional Assignation or Nomination of an Executor, I thought good to deliver first, *What it is* [a]; secondly, *What manner of words do make the Disposition to be Conditional* [b]; thirdly, *How many kinds of Conditions there be* [c]; fourthly, *What is the effect of a Conditional Assignation of an Executor* [d]; fifthly, I have examined *certain Questions*, not impertinent hereunto [e].

The Assignation (2) of an Executor is Conditional, when the Testator doth not make his Executor simply, but doth add some quality to the Assignation, whereby the Effect of the Disposition is suspended or hindered, and dependeth upon some future event [f]. As for example, the Testator maketh *A. B.* his Executor, if his Ship shall return from *Venice*.

Divers (3) words there be, whereby the Disposition of the Testator is made Conditional. First and principally, by this word (*If* [g]) as in the former example. By this word also (*when*) the Disposition is sometimes made Conditional; namely, when it is joyned to a Verb of the Future tense. As I make *A. B.* my Executor, or give him One hundred pound when he shall be of the age of Twenty one years [h], or when he shall be married [i]. Sometimes by this word (*whiles*;) as, I make my Wife Executrix, or give her a hundred pound, whiles she shall abide

[a] Eod. § n. 2.
[b] Infra n. 3.
[c] Infra n. 4.
[d] Infra eadem part. § 5.
[e] Infra ead. § 7. 8, 9. cum sequen. usque ad § 16.
[f] Sichard. in Rub. de Instit. & sub. C. n. 1. Graff. Thesaur. com. op. § legatum, q. 46.
[g] Bar. in L. 1. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 10. tit. 5.
[h] Sichard. in Rub. de Instit. & sub. C. n. 1.
[i] Bar. in de L. 1. de cond. & demon. ff. n. 8, 9. & Paul. de Castr. in eodem L. Vasq. de success. progress. l. 3. § 29. n. 3. in fin.

abide with my Children; for it is in effect, as though the Teſtator had ſaid, *If ſhe abide* [k]. Alſo by theſe words (*whenſoever, whereſoever*) the Diſpoſition is made Conditional [l]; ſometimes alſo by theſe words (*which, what perſon, whoſoever*;) as, I make him my Executor, or give him a hundred pounds which ſhall marry my Daughter [m]; ſometimes the *Ablative caſe abſolute*, doth infer a Condition, as (my Son being dead) I make *A. B.* my Executor [n]; in which caſe, not only *A. B.* is aſſigned Conditionally, that is to ſay, If the Teſtators Son be dead, but alſo the Teſtators Son, if he be living, is preſumed to be aſſigned during his life [o]. Divers other words there be, whereby the Diſpoſition is made Conditional, wherein *Bartolus* [p] hath not only taken great pains, but hath alſo been at ſome coſt (as it ſhould ſeem) in making a great Feaſt, marſhalling together all ſuch Nouns, Pronouns, Verbs, *&c.* which make the Diſpoſition Conditional, to whom I refer the Reader to be ſatisfied.

Manifold (4) are the Diviſions of Conditions [q]; but the plaineſt, and fitteſt for this Treatiſe, I ſuppoſe to be this, *viz.* Of Conditions, ſome be *neceſſary*, ſome *impoſſible*, ſome *poſſible* [r] or *indifferent*.

Of neceſſary (5) Conditions, ſome may be ſo termed, in reſpect of *Fact*, ſome in reſpect of *Law* [s]. By neceſſary Conditions, in reſpect of Fact, I underſtand thoſe Conditions, whereof there is a certain and infallible Natural cauſe, by force whereof, the Condition muſt neceſſarily follow: As if the Teſtator make *A. B.* his Executor, or give him a hundred pound, if the Sun ſhall riſe the next day [t]. Of (6) this kind of neceſſary Conditions there be two ſorts [u], ſome are certain in every Natural reſpect, that is to ſay, It is not only certain, that the Condition will follow, but alſo when; as in the former Example of the Riſing of the Sun. And ſome again are certain, but not in every reſpect; as when the Teſtator maketh *A. B.* his Executor, if his Son ſhall die, or when his Son ſhall die; for albeit, it be certain, that every Man muſt die, yet when, where, or how, it is uncertain [x]. By neceſſary Conditions ſo termed in reſpect of *Law*, I underſtand all ſuch Conditions, which the Law requireth in every act, albeit the ſame were not expreſſed. As for example, the Teſtator ſaith, I make *A. B.* my Executor, if he will intermeddle therewith [y]; or I give *A. B.* a hundred pound, if he will [z]. This kind of neceſſary Condition is ſometimes expreſſed by the Teſtator, and ſometimes not expreſſed [a].

† 7 Of impoſſible Conditions, there be four ſorts [b]; in the firſt ſort † 8 are contained thoſe whereunto *Nature is an impediment*. For example, The Teſtator maketh *A. B.* his Executor, or giveth him a

[k] Sichard. in d. Rub. Bar. in L. ſi Titio ff. quando dies legat. cedit.

[l] L. ſi ita ſcriptum § fin. de leg. 2. ff. Sichard. ubi ſupra.

[m] Sichard. in d. Rub. n. 4.

[n] Ripa. in L. centurio ff. de vulg. & pupil. ſub n. 160, 161. Dyer, fol. 74. n. 16.

[o] Ripa. ubi ſupra Alex. conſil. 185. l. 2.

[p] Bar. in L. 1. de cond. & demon. ff.

[q] Vide Sichard. in Rub. de Inſt. & ſub C. à quo multifariam dividitur conditio, 1. In tacitam & expreſſam, quarum deinde utraque ſpecies in tres ſpecies ſubdividitur. Tacita nimirum (air) ex diſpoſitione vel naturæ, vel juris, vel teſtatoris ſuboritur; expreſſa autem, aut eſt neceſſaria, aut impoſſibilis, aut indifferens, ſeu poſſibilis. Et harum rurſus quælibet ſpecies multiplex quas ego ſpecies in hoc § explicavi.

[r] Sichard. in d. Rub.

[s] Bar. in L. 1. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 10. tit. 5.

[t] Paul. de Caſtr. in L. ſi pupillus, § ſub cond. ff. de Novat. Alex. conſil. 59. n. 14. vol. 4. Sichard. ubi ſupra.

[u] Tu ſi placeat (Juſtinianiſta) videas Bald. in d. L. ſi pupillos. § qui ſub cond. ubi poſt gloſſ. ponit tria exempla neceſſariæ conditionis; unum neceſſitatis futuræ ſecundum naturam, veluti ſi moriar; aliud neceſſitatis futuræ ſecundum fidem catholicam, ut ſi Antichriſtus natus fuerit; tertium neceſſitatis præſentis, veluti ſi non tetigero cœlum digito. [x] Sichard. in d. Rub. de Inſtit. & ſub. C. [y] Graſſ. Theſaur. com. op. § legatum, q. 47. L. hæc verba. de leg. 1. ff. [z] L. ſi ita § illi ff. de leg. 1. [a] DD. in d. L. hæc verba. [b] Sichard. in d. Rub. de Inſtit. & ſub. C. cui adde Zaſium in L. impoſſibilis, de verb. ob. ff.

hundred

hundred pound if he touch the Skies with his finger; or if he drink up all the water in the Sea[c]. In (9) the second sort are contained those Conditions which be *contrary to Law, or good Manners*: As for example, The Testator maketh *A. B.* his Executor, or giveth him a hundred pound if he murther such a Man, or deflower such a Woman[d]; this Condition is unlawful and unhoneſt, and consequently to be deemed unpossible: For the Law would have us to think every thing impossible to be done, which is unlawful to be done[e]; hereupon it is said, *Id possumus quod de jure possumus*, as if every thing unlawful were also impossible[f]. In (10) the third sort are contained these Conditions, which albeit they are not otherwise utterly impossible, in respect of *Nature*, or of *Law*, yet in respect of the *person*, are *so hard, that they seem impossible*; as if the Testator make *A. B.* his Executor, if he shall marry the Kings Daughter, he being but a base Subject[g]. In (11) the fourth sort are contained those Conditions, which by reason of *contrariety* or *repugnant perplexity* be impossible, or incompatible[h]; as if the Testator say, If my Son be Executor, I make my Daughter my only Executrix; and if my Daughter be Executrix, I will that my Son be sole Executor[i].

Possible (12) Conditions are those which are, as it were, in the midst betwixt *necessary* and *impossible Conditions*, and which are *indifferent*, either to be, or not to be[k]. Of (13) Possible Conditions; some are termed *casual*, some *arbitrary*, and some are said to be *mixt Conditions*[l]. Casual Conditions are those whereof the event is uncertain, in respect of Humane Knowledge[m]: As for example, the Testator doth make *A. B.* his Executor, or give him a hundred pound, if the King of *Spain* die this year[n]. *Arbitrary Conditions* are those which the Law esteemeth to be in his power, on whom the Condition is imposed[o]: As for example, the Testator maketh *A. B.* his Executor, or giveth him a hundred pound, if he shall go to the Church[p]. *Mixt Conditions* are those which are partly arbitrary, and partly casual[q], or partly in his power, on whom the Condition is imposed, and partly in the power of some other: As for example, the Testator maketh *A. B.* his Executor, or giveth him a hundred pound, if he marry the Testators Daughter. Furthermore (14) of Possible Conditions, some consist in *chancing*, some in *giving*, and some in *doing*[r]. Finally, (15) Of Conditions, some be *Affirmative*, some *Negative*[s], the use of all which distinctions doth hereafter insue[t].

[c] § Impossibilis, Institut. de hæred. instituend. & Minsing. ibid. L. impossibilis, ff. de verb. ob. & Bar. ac alii ibid.
[d] Minsing. in d. § Impossibilis & DD. in d. L. impossibilis.
[e] L. si filius ff. de cond. Institut.
[f] DD. in d. L. si filius.
[g] Sichard. in d. Rub. de Institut. & sub. C. Minsing. in d. § impossibilis, Zas. in d. L. impossibilis ff. de verb. ob.
[h] L. si Titius ff. de cond. Instit.
[i] D. L. si Titius. Minsing. in d. § impossibilis.
[k] Sichard. in Rub. de Institut. & sub. C. n. 9.
[l] L. unic. § fin autem C. de cad. tol. Bar. in L. 1. de Institut. & sub. C. Mantic. de conject. ult. vol. lib. 10. tit. 5. n. 3. Wesenb. in tit. de cond. Instit. ff.
[m] Spiegel. Lexic. verb. fortuitum.
[n] Minsing. in § pen. Institut. de hæred. Instit.
[o] Sichard. in d. Rub. Vigl. & Minsing. in § pen. de hæred. Instit.
[p] Jas. in L. si filius à patre. ff. delib. & posthu. n. 1.
[q] Bar. in L. 1. de Inst. & sub. C. part. § pro cum sequen. usque ad § 16.
[r] L. in facto ff. de cond. & demon.
[s] D. L. in facto.
[t] Infra eadem

Sect. VI. Of the Effect of a Conditional Disposition.

1. *Divers and contrary Effects of Conditions.*
2. *Two Rules, whereof the former is; That necessary and impossible Conditions do not suspend the effect of the Disposition.*

3. Ex-

3. *Examples of this former Rule.*
4. *The ſecond Rule is, That Poſſible Conditions do ſuſpend the Effect of the Diſpoſition.*
5. *Example of the ſame Rule.*
6. *Conditions partly certain, and partly uncertain, do ſuſpend the Effect of the Diſpoſition.*
7. *Neceſſary Conditions being otherwiſe expreſſed than underſtood, ſuſpend the Effect of the Diſpoſition.*
8. *Impoſſible Conditions, which the Teſtator ſuppoſed to be poſſible, do ſuſpend the Effect of the Diſpoſition.*
9. *Divers Reſtraints of this laſt Poſition being the fourth Limitation of the former Rule.*
10. *Very hard Conditions, or almoſt impoſſible, do ſuſpend the Effect of the Diſpoſition.*
11. *A Reſtraint of this laſt Poſition being the fifth Limitation.*
12. *Impoſſible Conditions Negatively conceived, are not void themſelves, but make void the Diſpoſition.*
13. *A Reſtraint of this laſt Concluſion, being the ſixth Limitation.*
14. *Conditions which become Impoſſible, being at the firſt Poſſible, do hinder the Effect of the Diſpoſition.*
15. *A Reſtraint of this Concluſion being the ſeventh Limitation of the former Rule.*
16. *The Condition which is both Impoſſible and unhoneſt, maketh void the Diſpoſition.*
17. *Conditions which be Impoſſible, by reaſon of Repugnancy, make void the Diſpoſition.*
18. *A Reſtraint of this laſt Limitation.*
19. *Poſſible Conditions do ſuſpend the Effect of the Diſpoſition, until they be accompliſhed.*
20. *Divers Limitations of this Poſition being the ſecond Rule.*
21. *A further Conſideration of the former Concluſions, together with other Queſtions.*

THe (1) manifold diverſity of Conditions, breedeth many ſundry and contrary Effects. For ſometimes, he that is appointed Executor conditionally, or to whom any Legacy is given conditionally, is not to be admitted to the Executorſhip, nor can effectually demand the Legacy, until the Condition be accompliſhed. And again, ſometimes he that is named Executor, or to whom any thing is bequeathed upon Condition, may preſently be admitted to the Executorſhip, or demand the Legacy, though the Condition be not yet accompliſhed, or as though no Condition at all were expreſſed.

Wherefore, that we may know when the Condition is to be firſt accompliſhed, before the Executor can be admitted, or the Legatary demand his Legacy; and contrariwiſe, when the Executor may be admitted, or the Legatary make his demand before the accompliſhment of the Condition; I thought good to deliver two Rules, with their Limitations.

The

The (2) former Rule is this, *When the Condition is extream, that is to say, Either necessary or impossible, such Condition hindreth not the Executor nor Legatary, but that he may be admitted to the Executorship, or recover the Legacy; as if such had not been at all expressed* [a]. For example, (3) the Testator doth make thee his Executor, or doth give thee a hundred pound, if the Sun shall arise upon *Easter* day [b]; or the Testator doth make thee his Executor, or giveth thee a hundred pound if thou shalt drink up all the Water in the Sea [c]: Both these Conditions are extream, the one necessary, the other impossible; and therefore in these two Cases thou maist be admitted Executor, or obtain the Legacy; as if the Disposition had been simple, or without any such Condition [d].

The (4) second Rule is this, *When the Condition is not extream, but indifferent or possible, then the same Condition must first be satisfied before the Executor can be admitted, or the Legatary recover his Legacy* [e]. For example, (5) the Testator doth make thee his Executor, or doth give thee a hundred pound, if his Ship shall return from *Venice*. This Condition is indifferent, neither necessary nor impossible [f]. In the mean time therefore, until the same Condition be extant, thou canst neither be Executor, nor obtain the Legacy by force of that Disposition [g]. To return to the former Rule, the same is diversly limitted or restrained.

The first Limitation thereof may be this, that albeit (6) that Condition which by course of Nature must needs follow, is accounted as it were already accomplished by Reason of the infallible certainty; yet when the Condition is not in every respect certain, but certain and uncertain in divers respects. As for example, the Testator maketh *A. B.* his Executor, or giveth him a hundred pound, if, or when his Son shall die [h]. Howsoever this Condition be certain in respect of death, because it is not certain in respect of the time of his death; therefore in the mean time, the Executor or Legatary, where there is such a Condition, cannot obtain the Executorship or Legacy, but must expect the event of the Condition [i].

Another (7) Limitation to the former Rule is this, Although the Disposition be not made conditional by expressing of that Condition, which by the Law is necessarily understood [k]. Nevertheless, if the Condition be expressed in other manner than is understood, the Disposition is thereby made conditional [l]; so that in the mean time, the effect thereof is suspended. As for example, the Testator saith, I give to *A. B.* twenty pound if he will [m]. In which case, except the Legatary do by some means declare his willingness, the Legacy is not due; and if he die in the mean time, before he have declared his willingness, the Legacy is not transferred to the Executor or Administrator of the Legatary [n]; whereas, if no such Condition had been expressed, but that the Legacy had been left simply, then albeit the Le-

[a] L. si pupillus, § qui sub conditione de Novar. L. nam etsi. L. quod si ea. de cond. indeb. L. Julianus de jure, de lib. L. hæres meus de cond. & demon. L. 1. L. conditiones L. filius, L. quandam. L. mulier de condit. Institut. ff. L. reprehendenda, de Instit. & sub C. § impossibilis, Inst. de hæred. Instit.

[b] Paul. de Castr. in d. L. si pupillus § qui sub condit. Sichard. in Rub de Instit. & sub. C. n. 3.

[c] Minsing. in § impossibilis, Instit. de hæred. Instit.

[d] Per LL. supradictas.

[e] L. qui hæred. de condit. & demon. L. si quis sub conditione, si quis omis. eam Testa. L. cedere diem, de verb. sig. ff. Grass. com. op. § legatum, q. 52. Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2. dub. 2 fol. 66. n. 109.

[f] Minsing. in § hæres Instit. de hæred. Instit.

[g] D. L. qui hæred. & ibi Gloss. Bar. & alii.

[h] Nihil interesse utrum testator dixerit si morietur, vel cum moritur, patet, per Bar. Castr. & Alex. in L. extraneum, L. 1. C. de hæred. Instit. quorum opinio communis est, ait Alex. in d. L. extraneum, in d. Rub. de Instit. ibi, si volet, id est, distinguit, Practic. Papiens. in forma libelli, pro legat. rei singular. fo. 155.

[i] Paul. de Castr. & Jas. in d. L. extraneum, Sichar. & sub C.

[k] L. hæc verba, ff. de leg. 1.

[l] L. si ita, § illi ff. de leg. 1.

[m] D. § illi.

[n] Jas. & alii in d. § illi. Quære tamen, isto siquidem casu licet secus sit in contractibus si se velle declaraverit.

gatary

gatary had died, not knowing of the ſaid bequeſt, his Executors or Adminiſtrators might have obtained the ſame [o].

The third Limitation is, When it doth appear to be the Teſtators meaning, by the expreſſing of the ſaid Neceſſary Condition, to make the Diſpoſition conditional [p].

The fourth is, That (8) although Impoſſible Conditions, whether they be impoſſible by Nature or by Law, do not hinder the effect of the Diſpoſition, being reputed as if they were not written nor uttered [q]: Nevertheleſs, if the Teſtator did ſuppoſe the ſame Condition to be poſſible or lawful, then is not the Condition void, but the Diſpoſition whereunto it is added [r]. As for example, the Teſtator maketh *A. B.* his Executor, or giveth him a hundred pound, if he marry his, the Teſtators Daughter, ſuppoſing her to be living, whereas ſhe is dead; in this caſe the Condition is impoſſible, for the Legatary cannot marry a dead Woman: And yet nevertheleſs, becauſe the Teſtator did think her to be living, and ſo the Condition to be poſſible, *A. B.* cannot be Executor, nor obtain the Legacy; for it is not likely, that the Teſtator would have made him Executor, or have given him a hundred pound, if he had known or believed his Daughter to have been dead [s]. Howbeit (9) there be divers Caſes wherein the Diſpoſition is not void, by reaſon of an Impoſſible Condition, which the Teſtator did account poſſible and lawful; but the Condition it ſelf is void, howſoever it ſeemed poſſible in the opinion of the Teſtator. One is, where the Condition may be accompliſhed by ſome equivalent means, though not in the ſame manner deſcribed in the Diſpoſition [t]: Another Caſe is, when the Teſtator after the making of his Will, underſtanding the Condition to be impoſſible, did nevertheleſs confirm his Will by Codicils [u]. The like is, when the Teſtator was doubtful, whether the Condition were poſſible or no [x], or the bequeſt were in favor of Liberty [y], or *in favorem piæ cauſæ*, when the Teſtator doth bequeath any thing to be imployed to godly uſes; for then the Condition which he ſuppoſed poſſible, is rejected, and the Diſpoſition available, as pure and ſimple [z].

The fifth is, when the (10) Condition is not utterly impoſſible, but very hard, and as it were impoſſible to be performed by him, on whom it is impoſed. In which caſe it ſeemeth to be the purpoſe of the Teſtator, that the party ſhall reap no benefit by that Diſpoſition; otherwiſe the Teſtator would not have impoſed ſo hard and difficult a Condition [a]: And therefore in this caſe, the Condition doth ſuſpend the Effect of the Diſpoſition, until the Condition perhaps be accompliſhed [b]. Notwithſtanding, (11) if the Condition be impoſſible only in the reſpect of the ſhortneſs of the time preſcribed by the Teſtator. As if he make *A. B.* his Executor, or give him an hundred pound, if he do erect a Monument within three days after his death; in this caſe the Condition hurteth not [c], for that it reſpecteth

o Bar. Zaſ. & alii in d. L. hæc verba, ff. de lega. 1.

p Graſſ. Theſaur. com. op. § legatum, q. 47. ubi etiam oſtenditur quomodo appareat hujuſmodi teſtatoris voluntas.

q L. 3. ff. de cond. & demon. § impoſſibilis, Inſtit. de hæred. Inſtit. Groſſ. Theſaur. com. op. § legatum, q. 50.

r L. ſervo manumiſſ. ff. Le cond. indebit.

s DD. in *d.* L. ſervo manumiſſo.

t L. hujuſmodi. § ſi ita cui. ff. de leg. 1. Bar. in L. 1. de cond. & demon. ff. Jaſ. in d. L. ſi ita. § ille, de leg. 1.

u Jaſ. in d. L. ſervo manumiſſ. Are. in L. impoſſibil. de ver. ob. ff.

x Bar. in L. ab omnibus, § in teſt. de leg. 1. Are. in L. impoſſibilis de verb. ob. Jaſ. in d. L. ſervo, manumiſſ. de cond. indeb. ff.

y L. civitatem § falſum juncta gloſ. de condit. & demon. L. cùm Stichus, de ſtat. lib. ff. & Jaſ. in de L. ſerve.

z Bald. in L. 1. C. de com. ſervo. manumiſſ. Bar. in L. proxime, § L. de Rub. de inſt. & ſub his quæ in teſta. del. ff. & clarius per Jaſ. in d. L. ſervo manumiſſ. *a* Richard. in C. Minſing. in § impoſſibilis inſtit. de hæred. inſtituend. *b* L. cùm hæres § 1. de ſtatu. lib. L. continuus § illud, de verb. ob. ff. *c* L. ſi mihi & tibi, § 1. ff. de leg. 1.

the Execution, and not the substance of the Will. And it is to be understood, that the Testator would have it performed with as great expedition as is possible [d].

The sixth is, When (12) the Impossible Condition is conceived Negatively, for then it is not accounted as if it were void it self, (as is the Affirmative Impossible Condition) but it maketh void the Disposition whereunto it is adjoyned. As for example, the Testator chargeth his Executor, to whom he hath also given the residue of his Goods, that if he do not touch the Skies with his finger, or do not kill his Father, then to pay to *A. B.* an hundred pound; in this Case the Legacy is void [e]. The Reason is, because the Executor who otherwise should have the same thing bequeathed, is not to be punished for not doing that thing which is impossible or unhoneſt to be done [f]. But (13) if the Negative Impossible Condition be not set down in way of penalty, but simply, the Disposition is not void, but taketh effect presently. As for example, the Testator maketh *A.B.* his Executor, or giveth him a hundred pound, if he do not drink up all the Water in the Sea: In this Case (if any were so fond, as to add any such Condition) the effect of the Disposition is not hindred, and so *A. B.* is to be admitted Executor, or may obtain the Legacy, as if no Condition were expressed [g].

The seventh Limitation is, When (14) the Condition was not impossible at the first, but becometh impossible afterwards; for then it is not void, but maketh the Disposition void. For example, the Testator maketh *A. B.* his Executor; or giveth him a hundred pound, if he marry his, the Testators Daughter; afterwards, and before Marriage, this Woman dieth, whereby the Condition is made impossible. In this Case the Condition although now impossible, is not void, but maketh void the Disposition; and so *A. B.* cannot be Executor, nor obtain the Legacy by vertue of such Disposition [h]. But (15) if the Woman were not dead; but did refuse to be married, and so the Condition become, as it were impossible, for lack of her consent. In this Case the Disposition were not void, and so he might be admitted to the Executorship, or obtain the Legacy, as if no Condition had been imposed, or rather as if the same had been accomplished; as elsewhere [i] is more fully declared.

The eighth is, When (16) the Condition is both impossible and unhoneſt, for then the Disposition is thereby void; and that in disfavor of the Testator, who added such a Condition [k]: Whereas if the Condition had been only impossible or unlawful, the Disposition had been good, and that in favor of the Testament [l].

The ninth is, When the Condition is impossible by reason of perplexity, whereof there is example before; for then the Disposition is void [m].

The tenth is, When (17) the Condition is repugnant to the nature of the Disposition, as in captious Dispositions, whereof I have spoken hereafter.

[d] Jas. Lanc. Dec. & alii in d. § 1. Zas. in L. continuus, § illud. de ver. ob. ff.

[e] § L. ultim. Instit. de lega. in fin. L. ab eo, C. de fidei com. L. unic. C. de his quæ Pæn. nomine.

[f] Minsing. in d. § ult. instit. lega. Casirer. in d. L. unic. C. de his Pæn.

[g] L. impossibilis, de verb. ob. ff. Bar. & alii in eand. L. Paul. de Castr. in d. L. unic. quem videas.

[h] Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 23. Menoch. de præsump. lib. 4. fol. 706. Qui hanc conclusionem & extendit & restringit ibidem, n. 40. cum sequen. Vide in eadem parte § 8. in fin.

[i] Infra eadem part. § 8.

[k] Bald. in L. si pater. de Instit. & sub. C. n. 5.

[l] Gloss. in § impossibilis, Instit. de hæred. Instit. aliud autem in contractibus obtiner.

[m] L. ubi repugnantia de reg. jur. ff. & ibi Cagnol. limitans eand. reg. gloss. in d. § impossibilis, adde Petr. Duen. Tract. reg. & fal. verb. conditio. ubi tradidit tres limitationes.

hereafter more at large [n]. Nothwithſtanding, (18) if the repugnancy be not in ſuch ſort, but that it may be reconciled, it hurteth not the Diſpoſition [o]. And therefore, if the Executor do name two Executors, (for example) his Son and his Daughter, with a Condition or *Proviſo*, that his Daughter do not Adminiſter: Albeit here ſeem a repugnancy in the Aſſignation of the Daughter, for that it is the office of every Executor to Adminiſter, yet becauſe the ſame may be reconciled, the Daughter is to be admitted to the Executorſhip, namely, to proſecute any Action, though not to Adminiſter further of any Goods whereof they are in poſſeſſion, or which ſhall after be by Action ſo recovered [p].

[n] Infra eadem part. § 11.

[o] Cagnol. in d. L. ubi repugnantia. de reg. ut. ff.

[p] Brook. Abridg. tit. executor. n. 2. 19 H. 8. Dyer, fol. 4.

The eleventh Limitation is, When the unhoneſt Condition is referred to the time paſt, for then it is not rejected, but doth either preſently confirm or infirm [q] the effect of the Diſpoſition.

[q] Covar. Tract. de ſponſal. part. 2. c. 3. § 1. n. 9.

Now that we have ſeen the Limitations of the firſt Rule, let us take a view of the Limitations of the ſecond Rule, which is that, *When (19) the Condition is poſſible, the effect of the Diſpoſition is ſuſpended, until the Condition be accompliſhed.* So that he which is made Executor, or to whom any thing is bequeathed under ſuch Condition, cannot be admitted to the Executorſhip, nor obtain the Legacy in the mean time [r]: Inſomuch, that it is not enough to perform the Condition by any other equivalent means, but it muſt be accompliſhed in that preciſe manner and form of the Condition, without varying in any one jot [s].

[r] L. qui hæred. de cond. & demon. L. ſi quis ſub conditione. Siquis omiſſ. cauſa. teſta. L. cædere diem. de verſig. ff. Graſſ. Theſaur. com. op. § legatum, q. 52. Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 109.

The firſt Limitation of this ſecond Rule is this, (20) When it doth not ſtand by the Executor or Legatary, wherefore the Condition is not performed; for then it is accounted to be accompliſhed [t]. Another Limitation is this, When the Condition is Negative; for there the Executor or Legatary, may, in the mean time, be admitted to the Executorſhip, or recover the Legacy, entring firſt into Bond to make reſtitution, if the Condition be not performed [u].

[s] L. qui hæred. L. Menius, de cond. & demon. ff.

[t] C. Imputari de reg. jur. lib. 6.

[u] L. Mutianæ, ff. de cond. & demon.

The third Limitation is, When the Condition was once accompliſhed, though it do not continue [x].

[x] Bar. ſubſtitutione, ff. de vulg. ſub.

The fourth Limitation is, When the Condition is poſſible, in reſpect of Fact, but not lawful [y].

[y] L. filius. ff. de cond. inſtit. ſupra eadem part. § 5.

But (21) for as much as none of theſe Concluſions do proceed ſimply or indiſtinctly, I thought good to examine every of them ſeverally, and at large, namely,

Firſt, Whether every Poſſible Condition ought to be obſerved preciſely, and *ad unguem* [z].

[z] Infra eadem parr. § prox.

Secondly, Whether it be ſufficient for the Executor or Legatary, that it ſtand not by them, wherefore the Condition is not accompliſhed [a].

[a] Infra eadem part. § 8.

Thirdly, When, and in what Caſes the Executor or Legatary is to be admitted to the Executorſhip, or may obtain his Legacy before the accompliſhment of the Condition by entring into Bond [b].

[b] Infra eadem part. § 9.

Fourthly, Whether it be ſufficient that the Condition was once performed, though it do not ſo endure [c].

[c] Infra eadem part. § 10.

Fifthly, Whereas it may be doubted of divers Conditions, whether they be lawful, or no: I have declared how far the ſame be lawful, or unlawful [d].

Unto the which Queſtions, I have alſo added theſe following.

Within what time the Condition may, or muſt be accompliſhed, when no certain time is limited by the Teſtator [e].

Then how that uſual Condition *(If he die without iſſue)* is to be underſtood, or when it is ſaid to be accompliſhed [f].

Finally, What order is to be taken concerning the Adminiſtration or Poſſeſſion of the Goods of the deceaſed, whiles the Condition of the Inſtitution of the Executor dependeth unaccompliſhed [g].

d Infra eadem part. § 11, 12, 13.

e Infra eadem part. § 14.

f Infra eadem part. § 15.

g Infra eadem part. § 16.

Sect. VII. Whether every Poſſible Condition ought to be obſerved preciſely.

1. *Conditions are of a ſtrict Interpretation.*
2. *Conditions inducing a Form, are to be obſerved preciſely.*
3. *Examples hereof.*
4. *When the Teſtator doth reſpect the end, it skilleth not of the means.*
5. *Voluntary Conditions are to be obſerved preciſely, not neceſſary Conditions.*
6. *He in whoſe favor the Condition is made, may conſent to other means.*
7. *The Condition of Payment to be made to the Infant, is ſatisfied by Payment to the Tutor.*
8. *In Subſtitutions it ſufficeth, that the Condition be effected by other equivalent means.*
9. *In favor of Liberty, or of Godly Uſes, the Condition need not to be preciſely obſerved.*
10. *Whether the Condition may be performed by another perſon, than him that is named in the Condition.*
11. *Where the Law alloweth other Means, the preciſe Form need not to be obſerved.*

FOr as much (1) as Conditions are ſaid to be of a ſtrict Interpretation [a], and to induce a Form to every Diſpoſition, whereunto they are joyned [b]; unto which Form, nothing may be added, nothing detracted, nothing altered [c]. Therefore it is holden for a Rule, that (2) every Poſſible Condition ought to be preciſely obſerved [d]: Neither is it ſufficient (but in ſome Caſes) to accompliſh the ſame by any other Means, or in any other manner than is preſcribed. For example, (3) the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou ſhalt give to *A. B.* Ten pound, thou not knowing of the Teſtators Will, doeſt of compaſſion or good will, give Ten pound to *A. B.* becauſe poor, and thou art rich. In this Caſe thou ſhalt not be reputed to have accompliſhed the Condition, becauſe thou being ignorant

a Michael. Graſſ. Theſaur. com. op. § legatum, q. 52. n. 1.
b Bald. in Authen. ut liceat. C. quando Mul. Tut. Offic. Fung. Tiraquel. de retract. § 1. gloſſ. 21. n. 13.
c Tiraquel. de retract. § gloſſ. 11. n. 11. Peckius in c. cùm nom. de reg. jur. in 6. n. 6.
d Graſſ. Theſaur. com. op. § legatum, q. 52. ubi atteſtatur de communi opinione.

ignorant of the Diſpoſition, didſt it not with a mind or purpoſe to ſatisfie the Condition [c]: Nevertheleſs, if thou didſt firſt know of the Condition, thou art preſumed to have given the Ten pound with a mind to perform the Condition, unleſs the contrary do appear [f]; ſo that it is not neceſſary to proteſt, or to affirm by words, That thou didſt give the Ten pound with a mind or intent to perform the Condition, ſeeing the ſame is preſumed, unleſs the contrary be proved [g]. Another example to the ſame effect, is this, The Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou pay Ten pound to *C. D.* before a certain time, within which time *C. D.* dieth, and thou payeſt the ſame Ten pound within the ſame time, to the Executor or Adminiſtrator of *C. D.* In this Caſe the Condition is not ſaid to be performed, and ſo thou canſt not be Executor, nor obtain the Legacy of a hundred pound, becauſe thou didſt not pay the Ten pound to *C. D.* himſelf, for the payment ought to have been made to *C. D.* himſelf [h], and not to his Executors or Adminiſtrators.

The firſt Limitation of the foreſaid Rule is, (4) When it doth appear that the Teſtator hath more reſpect to the end, than to the means; for then it is ſufficient that the Teſtament be accompliſhed, although in other manner than it is expreſſed in the Condition [i].

The ſecond Limitation is, When (5) the Condition is not voluntary, but neceſſary; for in neceſſary Conditions it skilleth not, whether the ſame be accompliſhed in that manner expreſſed by the Teſtator, or in any other good manner [k].

The third Limitation is, When (6) the perſon in whoſe favor the Condition was made, doth conſent that the ſame be accompliſhed in other manner [l]. For example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou give to *A. B.* Ten pound: So it is, that *A. B.* did ow unto thee Ten pound, and is contented to be releaſed of that Ten pound which he is to receive. In this Caſe the Condition ſhall be accounted for accompliſhed, as if the Ten pound had been really paid [m]. Theſe three Limitations (eſpecially the firſt of them) be ſo general, that they may ſeem to comprehend the reſidue of the Limitations; nevertheleſs, it ſhall not be amiſs, if I expreſs them for the better underſtanding of thoſe former Limitations.

The fourth Limitation therefore (7) is this, When that is paid to the Tutor, which is limited to the Child [n]. For example, thou art made Executor, or a hundred pound is bequeathed to thee, if thou pay unto the Teſtators Son (being an Infant) Ten pound: In this Caſe the Condition is ſufficiently performed, if payment be made to the Tutor of the Child [o]; eſpecially, if the Money be converted to the benefit of the Child [p]. And albeit, this Condition may be ſaid to be a voluntary Condition, becauſe it doth conſiſt in giving, yet in this Caſe the Teſtator is preſumed to have more regard to the end of the Condition;

e Gloſſ. & DD. in L. ſi quis hæredem C. de Inſtit. & ſub. & hæc eſt communis opinio, ut per Michael. Graſſ. d. § legatum, q. 52. n. 3.

f Bar. & Paul. de Caſtr. in L. 2. de cond. & demon.

g Bar. & Paul. de Caſtr. in d. L. 2.

h L. ſub diverſis, § ult. & ibi Bar. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 25. & hoc quidem ſine difficultate in hærede legatarii, quia hæredi legatarii ſolutio fieri non poteſt per d. § ult. ſed an idem juris ſit in hærede hæredis, quæſtio eſt magis dubia, de qua legendus eſt Mantic. ubi ſupra.

i Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 3.

k Bar. in L. Gallus, § quid ſi tantum, n. 2. de lib. & poſth. ff. Graſſ. Theſaur. com. op. § legatum, q. 52. Simo de Pratis. de interp. ult. vol. lib. 1. in fin. ubi etiam reſpondet quænam conditio ſit dicenda neceſſaria, vel voluntaria.

l Simo de Pratis. de interp. ult. vol. lib. 1. ſolut. ult. n. 34.

m Simo ubi ſupra licet forteſſe contrarium obtineat in contractibus, attenta diſpoſitione hujus regni Angliæ. Perkins, tit. condit. fol. 146.

n L. ſi fundus, ff. de cond. & demon.

o D. L. ſi fundus Graſſ. d. § legatum, q. 52. Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 29.

p Bar. in d. L. ſi fundus. Mantic. d. tit. 17. n. 29.

dition;

dition; namely, the benefit of the Child, then to the form of the Condition, For if payment ſhould be made to the Child, it might eaſily be conſumed, and do the Child little benefit [q], and therefore better for the Child, and more agreeable to the meaning of the Teſtator, and more ſafe for him that payeth the Money, to pay the ſame to the Tutor, rather than to the Infant [r].

The fifth Limitation is (8) in vulgar, or common Subſtitutions, for then it is ſufficient likewiſe, that the Condition be effected by other means, than according to the ſtrict Form of the Condition [s]. For example, the Teſtator maketh his Son Executor; and if he *will not*, he doth ſubſtitute thee Executor in his ſtead. If the Teſtators Son *cannot* be Executor. In this Caſe thou ſhalt be Executor, as if he had refuſed to be Executor; although reſpecting the Form of the Condition, thou art ſubſtitute only, in caſe the other *will not*, and not in caſe he *cannot*; the Reaſon is, becauſe in Subſtitutions the Law preſumeth, that the Teſtator doth more regard the effect, than the Form of the Condition [t].

The ſixth Limitation is (9) in favor of Liberty; that is to ſay, When the Lord or Soveraign, by his Teſtament, granteth unto his Villain or Bond-man freedom upon ſome Condition [u].

The ſeventh Limitation is, When that which is left conditionally, is to be diſtributed in *pios uſus*; for in theſe two Limitations, it is ſufficient that the Condition be effected by other equivalent means; though not according to the preciſe litteral Form of the Condition [x].

The eighth Limitation is, When the (10) Condition which conſiſteth in giving, is performed by another perſon, then by him (yet for him) who is named Executor, or to whom any thing is given upon Condition, if he give to another. In which Caſe it is all one, as if he himſelf had given the ſame [y].

The ninth Limitation is, When the Condition cannot be performed in ſuch manner as is preſcribed in the Condition. As for example, the Teſtator giveth a ſum of Money, if ſo many Sermons be made in ſuch a Church, within ſuch a time: During which time, the Church is interdicted; by occaſion whereof, the Condition cannot be accompliſhed. In this Caſe, the Diſpoſition is not abſolutely void [z], but the Money may be converted to ſome godly uſe [a].

The tenth Limitation is, (11) When the Law doth interpret it, as if it were preciſely obſerved, as may appear in the next Queſtion [b].

[q] Mantic. ubi ſupra.

[r] Alciat. de verb. ſignif. lib. 3. col. 81. in fin.

[s] Paul. de Caſtr. in L. ſi magiſter. C. de Inſtit. & ſub. n. 1. in fin.

[t] Paul. de Caſtr. ubi ſupra Alciat. de verb. ſignif. lib. 3. reg. 4. q. 2.

[u] Bar. in L. Mævius de cond. & demon. ff.

[x] Bar. in d. L. Mævius cum addit. ibid.

[y] Bar. in L. Arethuſa. de ſtat. hom. ff. & in L. fin. de cond. inſtit. ff. atque hoc eſt magis commune, teſte Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 10.

[z] L. legatum, de adminiſtr. rerum. ad civit. pertin. ff.

[a] Simo de Prætis. de interp. ult. vol. lib. 1. in fin.

[b] Infra § proxim.

Sect.

Sect. VIII. Whether the Condition be accounted for accompliſhed in Law, when it doth not ſtand by the Executor or Legatary; wherefore the ſame is not accompliſhed.

1. *No Man to be puniſhed, but ſuch as be faulty.*
2. *He is not reputed faulty in Law, who doth what he can.*
3. *Whether the Condition be reputed for accompliſhed, if it ſtand not by the party.*
4. *Certain Diſtinctions about the former Queſtion.*
5. *Arbitrary Conditions are accounted for accompliſhed, if it do not ſtand by the party.*
6. *The reaſon of the former Concluſion.*
7. *Arbitrary Conditions are not accounted for accompliſhed, where the party is in fault.*
8. *Caſual Conditions are not reputed to be accompliſhed before the event.*
9. *The reaſon of the different effect, betwixt caſual and arbitrary Conditions.*
10. *Certain Caſes wherein caſual Conditions be reputed as accompliſhed, albeit the ſame be not ſo indeed.*
11. *In mixed Conditions, this conſideration is firſt to be had, how the impediment cometh.*
12. *The impediment in mixed Conditions, may happen divers ways.*
13. *When it ſtandeth by him, by whom the Condition is to be performed, the ſame is not reputed for compleat.*
14. *What if after the firſt refuſal he conſent, and then the other party is willing.*
15. *A Reſtraint of the laſt Poſition.*
16. *When it ſtandeth by the party in whom the Condition is to be performed, the ſame is not reputed for compleat.*
17. *A Limitation of the former Concluſion.*
18. *When the Teſtator doth hinder the performance of the Condition, it hurteth not the Executor or Legatary.*
19. *When a third perſon doth hinder the performance of the Condition, whether it hurt the Executor or Legatary.*
20. *The accompliſhment of the Condition being hindred by caſual means, whether it hurt the Executor or Legatary.*

IT agreeth (1) with Equity and Humanity, That no Man be puniſhed, or deprived of his Right, without his Fault [a]; and it ſeemeth, that (2) he is not in fault, but worthy to be excuſed, who doth whatſoever lieth in him for the accompliſhing of that which is impoſed upon him [b]: Wherefore no marvel if at the firſt view it ſeem true, that when

[a] C. ſine culpa de reg jur. 6.

[b] Peckius in c. imputari. de reg. jur. 6.

when it doth not ſtand by the Executor or Legatary; wherefore the Condition is not performed (they doing whatſoever in them lieth, for to accompliſh the ſame) that then the ſame ſhould be accounted as it had been fully performed [c]. And indeed, ſo it is (3) regularly for the moſt part very true, That when it doth not ſtand by him to whom it appertaineth, wherefore the Condition is not accompliſhed, it ought to be accounted as if it were performed [d]: But this Rule doth not take place perpetually.

Wherefore, (4) if we will underſtand when this Rule doth hold or fail, we are to call to mind ſome of the former Diſtinctions or Diviſions of Conditions [e], eſpecially this, That of Conditions, ſome be *arbitrary*, ſuch as the Law preſumeth to be in the will and power of the Man, to whom they are impoſed [f]: Some be *caſual*, ſuch as are not in the power of that Man to whom they are impoſed, but even in the power of ſome other thing, or perſon; ſo that the event thereof is to us uncertain [g]: And ſome be *mixed* Conditions, ſuch as conſiſt partly in our own power, and partly in the power of ſome other thing or perſon [h]. For example of which ſeveral Conditions, I refer the Reader to thoſe former which I have there ſet down [i].

When (5) the Condition is meer *arbitrary*, then if it ſtand not by him, by whom the Condition is to be performed, the Law reputeth the ſame as if it were fully accompliſhed, though indeed it remain unperformed [k]. For example, the Teſtator doth make thee his Executor, or giveth thee a hundred pound if thou go to Church on *Eaſter* day [l]. That day being come, by reaſon of overflowing of Waters, or ſome other neceſſary impediment, thou art not then able to go to the Church, being otherwiſe willing to go, if thou hadſt not been hindered. In this Caſe thou art to be admitted Executor, and maiſt recover thy Legacy, as if thou hadſt gone to the Church that day [m]; the (6) reaſon wherefore the Condition is accounted for accompliſhed in Law, albeit reſpecting the Fact it is not accompliſhed, I ſuppoſe to be this, Becauſe the Teſtator is preſumed to have more regard to the good will and indeavor, in theſe Conditions which be within thy power, than to the event of the Condition [n]; ſo that by ſatisfying the expectation of the Teſtator, thou haſt alſo ſatisfied the exaction of Law [o].

Howbeit, (7) even there alſo, where the Condition is arbitrary, and where the Teſtator doth, as it were, accept good will for a full performance, if he by whom the Condition is to be performed, were in fault, by occaſion of which fault, the Condition cannot indeed be accompliſhed, though perhaps the party would willingly perform the ſame, if then he could, there the ſame Condition is not reputed to be performed in fiction of Law [p]. For example, the Teſtator maketh *A. B.* his Executor, or giveth him a hundred pound, if he go to the Church on ſuch a day; upon the which day *A. B.* intending to accompliſh the Condition, proceedeth towards the Church: As he is going, committeth ſome crime or offence, whereupon he is arreſted and ſtayed, ſo that he cannot go to the Church according to his purpoſe. In this

[c] C. cùm non ſtat. c. imputari, de reg. jur. lib. 6.
[d] D. cùm non ſtat. d. c. imputari, de reg. jur. lib. 6.
[e] Supra eadem part. § 5.
[f] L. unic. § ſin autem C. de cad. tollend. Vigl. & Minſing. in § Pen. Inſtit. de hæred. Inſtit.
[g] D. § ſin autem.
[h] D. § ſin autem. Vigl. & Minſing. ubi ſupra.
[i] Supra eadem part. § 11.
[k] L. quæ ſub conditione § 1. ff. de cond. Inſtit. Bar. in L. 1. C. de Inſtit. & ſub.
[l] Hoc eſſe exemplum, poteſtativæ conditionis, patet ex Sichard. in Rub. de inſtit. & ſub. C. n. 9. & Minſingero, in § Pen. Inſtit. de hæred. Inſtit. n. 2. quorum alter profert exemplum eundi Francfordium, alter eundi Biſcanum: Reliqui fere omnes inſtant in hoc exemplo, ſi aſcenderis capitolium. DD. in d. § ſin autem, C. de cad. tol. & in d. § Pen. Inſtit. de hæred. inſtituend.
[m] D. L. quæ ſub conditione, § 1. ff. de condit. Inſtit. & c. imputari de reg. jur. 6.
[n] Sichard. poſt Bar. & Bald. in d. L. 1. C. de Inſt. & ſub.
[o] DD. in d. L. 1.
[p] Mant. de conject. ult. vol. lib. 11. tit. 16. n. 24. poſt Bar. & Bald. in d. L. 1. C. de Inſtit. & ſub.

this Caſe the Condition is not accounted for accompliſhed, for that he, by whom the Condition was to be accompliſhed [q], was himſelf in the fault, and the cauſe wherefore the ſame was not accompliſhed. So it is if the Condition cannot be performed, by the negligence or delay of the perſon, by whom the ſame ought to have been performed [r]: And although an impediment is ſaid to excuſe a Man from delay [s], yet when the impediment may be foreſeen and prevented, ſuch impediment ſhall not excuſe him which doth not avoid the ſame [t]. If thou crave an example, let this be the ſame, The Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou go to the Church within two moneths; during the firſt moneth thou doeſt not go, during the ſecond, thou knoweſt thou ſhalt not be able to go, by reaſon of ſome impediment, be it by occaſion of Wars, or of the weather, or of the way, or of ſome infirmity in thy own Body; and then being letted, thou makeſt an offer to go, and doeſt proteſt that it doth not ſtand by thee, and that thou wouldeſt go if it were poſſible: Neither this Proteſtation, nor this impediment will relieve thee, becauſe thou didſt wittingly fall into theſe difficulties, and wouldſt not go when thou mightſt ſafely have gone [u]. When (8) the Condition is meer *caſual*, the ſame is neither accounted for accompliſhed or extant, in preſumption or fiction of Law, neither yet for unaccompliſhed or deficient, until the actual event of the ſame Condition do firſt come to paſs [x]. And therefore, if the Teſtator make thee his Executor, or give thee a hundred pound, if the King of *Spain* die this year [y]. In this Caſe, until the event do indeed declare whether the King die this year or no, the Condition is neither accounted for extant or deficient, but is ſuſpended [z]. And if he die, then is the Condition ſaid to be purified or extant, and ſo thou art to be admitted, otherwiſe not [a]. So there is a great difference, whether the Condition be arbitrary or caſual; for, the one is divers times accounted for accompliſhed in Law, though not in Fact; but the other is not accounted for accompliſhed or extant in Law, unleſs the ſame be accompliſhed in Fact alſo [b]. The (9) reaſon of the difference is partly ſhewed before; for in Arbitrary Conditions, the Teſtator is preſumed not to exact more than he may eaſily perform on whom ſuch Condition is impoſed [c]; and ſo it is ſufficient that it ſtand not by him, that the ſame Condition is not performed: But here in caſual Conditions, for as much as the Teſtator doth not refer it to that which is in his power on whom the condition is laid; therefore the Teſtator is thought to refer the force or effect of this Diſpoſition, to the determination of Fortune [d], (or rather to ſpeak more Chriſtianly, to the Will of God;) and therefore this event of Gods Will muſt decide the doubt, I mean, whether he that is appointed under ſuch Condition, ſhall be Executor, or not, to obtain his Legacy, or not. Notwithſtanding (10) ſometimes even in caſual Conditions, it is ſufficient that it doth not ſtand by the Executor or Legatary; wherefore the ſame Condition is not accompliſhed, like as in arbitrary Conditions [e]. The firſt Caſe is, where the Teſtator would have ſo diſpoſed, howſoever the Condition ſhould ll o ut-

[q] Bar. & Bald. ubi ſupra. gloſſ. in c. imputari de reg. jur. 6. Aymo Cravetta. conſil. 202. n. 8.

[r] Bar. in d. L. 1. Mantic. de conject. ult. vol. l. 11. tit. 16. n. 14.

[s] DD. omnes in L. quod te ff. ſi cer. Pe.

[t] Gloſſ. & DD. in d. L. quod te. Zaſ. poſt alios in L. con inuus, § illud. ff. de verb. ob.

[u] C. Mona. de reg. jur. 6. Zaſ. in d. § illud. n. 6. fall. 4. & Peckius in L. fin. ad L. Rhodiam. de jactu.

[x] L. unic. § ſin autem C. de cad. tol. & ibi Bar.

[y] Vigli. & Minſing. in § pen. Inſtit. de hæred. inſtituend.

[z] Sichard. in Rub. de inſtit. & ſub. C.

[a] L. unic. § ſin autem C. de cad. tol.

[b] Eodem § ſin autem.

[c] Sichard. Bar. Bald. & fere omnes interp. in L. 1. de inſtit. & ſub C.

[d] Paul. de Caſtr. in L. quæ ſub conditione, de condit. inſtit.

[e] Mantic. de conject. ult. vol. l. 11. tit. 15. n. 15.

[f] Gloſſ. in L. 1. C. de inſtit. & ſub.

The ſecond is, when by the Fact, his accompliſhment of the Condition is hindered, to whom it is beneficial that the ſame ſhould never be performed [g]. The third Caſe is, in favor of freedom, or liberty from ſervitude [h].

If we (11) will know when a mixed Condition is reputed in Law to be accompliſhed, albeit in Fact the ſame be not performed, we muſt conſider by what means the impediment is miniſtred, namely, (12) Whether it proceed from the *perſon by whom* the Condition is to be performed, or from that *perſon to whom* the Condition is to be performed, or from *the Teſtator himſelf*, who deviſed the Condition, or from ſome *other third perſon*; or whether it happen by ſome *other means*, according to the ſecret purpoſe and Will of God, which we no leſs fooliſhly than commonly, call *Chance* or *Fortune*.

When (13) he that is made Executor, or to whom a Legacy is given upon a mixed Condition, is himſelf the only cauſe wherefore the Condition is not performed; then worthily is the ſame Condition not to be accounted for accompliſhed [i]. For example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound if thou marry his Daughter; thou refuſeſt ſo to do, with great reaſon is the Condition not reputed for performed, and ſo thou canſt not be Executor, nor obtain the Legacy [k]. Inſomuch, (14) that albeit afterwards thou become willing, and doeſt offer to marry her, and ſhe then refuſe this thy offer, and ſo it doth now ſtand by her, and not by thee, that the Condition is not performed: Nevertheleſs, thou canſt not reap any benefit by her refuſal, becauſe thou hadſt broken the Condition before, whereby thy right paſſed away and was extinguiſhed, and ſo thy repentance is now too late [l]; unleſs (15) at ſuch time as thou didſt refuſe, thou then couldeſt not marry, for that perhaps at that time thou wert not of ſufficient age to marry, for thy diſſent at that time when thou couldſt not conſent, doth not hinder thee [m].

When (16) the Condition is not performed by his means only, unto whom, or in whoſe perſon the ſame is to be accompliſhed, then it is reputed in Law, as if it were fulfilled indeed [n]. For example, The Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou marry his Daughter; thou art willing, and doeſt offer her marriage, which ſhe refuſeth: In this Caſe the Condition is reputed for compleat, and ſo thou maiſt recover the Executorſhip or Legacy [o]. Notwithſtanding, if (17) the words of the Condition be directed unto her, not unto thy ſelf. As for example, The Teſtator maketh thee his Executor, or giveth thee a hundred pound, if his Daughter marry thee. In this Caſe, if ſhe do refuſe, and it doth not ſtand by thee, the Condition is not reputed for accompliſhed [p], unleſs it were the meaning of the Teſtator, that thou ſhouldſt have the benefit of the Diſpoſition, in caſe of this her refuſal [q]. And yet there is no great difference betwixt the one phraſe and the other: For the Teſtator in ſaying, *If thou marry her*, doth neceſſarily underſtand thereby, if ſhe alſo be content to marry thee; for thou canſt not do the one, unleſs ſhe alſo do the other [r]: And therefore this Limitation is ſuſpected of ſome not

[g] L. jure civili. ff. de cond. & demon.
[h] L. fin. C. de neceſſar. inſtituend.
[i] L. in teſtam. el. 2. ff. de condit. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 37.
[k] Bar. in d. L. in teſta. Sichard. in L. 1. C. de Inſtit. & ſub Menoch. de præſump. lib. 4. fol. 1698. n. 22. Et in legato libertatis extenditur. ibid. n. 23.
[l] Jaſ. in d. L. 1. de Inſtit. & ſub. C. n. 7. & Sichard. in e. and. L. n. 9. & eſt com. op. teſte Graſſ. Theſaur. com. op. § legatum, q. 46. n. 16. poſt Dec. in d. L. 1. n. 13. Quam ſententiam intellige ut per Molin. in addit. ibid.
[m] L. ejus eſt nolle. de reg. jur. ff.
[n] L. Titio centum, § Titio, ff. de cond. & demon.
[o] D. L. Titio, § Titio.
[p] Mincat. de conject. ult. vol. lib. 11. tit. 18. n. 37.
[q] L. jure civili, ff. de cond. & demon.
[r] Socin. in d. L. in teſtam. Mantic. de conject. ult. vol. lib. 11. tit. 8. n. 37.

not to be found [s], notwithſtanding it is more generally approved, and rather admitted than the contrary opinion [t]. What if the Teſtator make *A. B.* his Executor, or give him a hundred pound if he marry his Daughter, and at the firſt *A. B.* is willing, and offereth to marry her, but ſhe refuſeth; afterward ſhe is willing, but he refuſeth. Whether in this Caſe is the Condition ſaid to be compleat? This Queſtion is ſatisfied afterwards [u].

When (18) the impediment doth proceed from the Teſtator himſelf, then the Condition is reputed for compleat. As for example, the Teſtator doth make thee his Executor, or giveth thee a hundred pound, upon Condition, If thou bury his Body in the Cathedral Church of *S. Peter* at *York*: The Teſtator dieth excommunicate (becauſe he refuſeth to come to the Church, or becauſe he is an Heretick or Schiſmatick, a manifeſt Uſurer, or for ſome other like cauſe) for which his Sepulchre, in that Caſe is denied: Seeing in this Caſe it doth not ſtand by thee, but by him, wherefore the Condition is not compleat; it ſhall not prejudice thee, but that thou maiſt be admitted to the Executorſhip or obtain the Legacy, as if thou hadſt indeed performed the condition [x].

When (19) the impediment doth proceed from a third perſon, then I ſuppoſe the Condition to be accounted in Law for accompliſhed [y]. For example, The Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou marry his Daughter within a moneth, during which moneth, a third perſon doth purpoſely hold her from thee, ſo that thou canſt not marry her within the time preſcribed. In this Caſe the Condition is reputed to be accompliſhed, and ſo thou mayeſt obtain the Executorſhip or Legacy, as if thou hadſt married her within the ſaid time [z]. But if the third perſon do not purpoſely detain her, being ignorant peradventure of the Teſtators Will, then it ſeemeth that the Condition is not reputed for compleat [a].

When (20) the impediment doth not ariſe by any of the means aforeſaid, but by caſual means (as we term it) when it proceedeth from the Will and Providence of Almighty God, the Law doth not account that Condition for compleat [b]. And therefore, if the Teſtator make thee his Executor, or give thee a hundred pound, if thou marry his Daughter, and ſhe dieth before thou haſt married her. In this Caſe the Condition ſhall not be accounted for accompliſhed or extant, but contrariwiſe (as it is indeed) unperformed and deficient; ſo that thou canſt not receive any benefit by that Conditional Diſpoſition [c]; for where the performance of the Condition is hindered by the Will and Providence of God, whereunto the Teſtator made relation, there the Law doth not allow any feigned performance [d], except it be in favor of Liberty from Bondage [e], or Alimentation, or in a Diſpoſition [f], *Ad pias cauſas* [g], or except the Condition be not Conditional, but Modal [h]; for (*conditio*) and (*modus*) do greatly differ, as in the next Paragraph is declared.

s Michael. Graſſ. Theſaur. com. op. § legatum, q. 16. n. 17.

t Alex. in L. 1. C. de Inſtit. & ſub.

u Infra eadem part. § 10. in fin.

x DD. in L. milites § ult. Ad L. Jul. de adul. ff. Schard. in L. 1. de Inſtit. & ſub. C. n. 1.

y Bar. in L. 1. in teſtam. el. ff. de cond. & demon.

z Bar. in d. L. in teſt. Bald. & Alex. in L. de Inſtit. & ſub. C. & hoc ego quidem procedere puto in hoc regno, etiamſi ille tertius injuſtè detineat mulierem, cùm apud nos Honoratus non habeat aliquam actionem contra injuſtum illum detentorem, pro damno, ſeu intereſſe. Videant autem Juſtinianiſtæ Manticam de conject. ult. vol. lib. 11. tit. 16. n. 22.

a Bald. Alex. & DD. in L. 1. C. de Inſtit. & ſub. Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 21.

b Hen. Boic. in c. ſicut. ex literis. De ſponſ extr. Bar. in L. 1. C. de Inſtit. & ſub.

c Gloſſ. & Dyn. in c. imputari de reg. jur. 6. L. Legatum. C. de Condit. inſerr. Menoch. de præſum. l. 4. f. 170. n. 40. ubi hanc concluſionem extendit & limitat. præſump. 182. Schard. & alii DD. in L. C. de Inſtit. & ſub.

d Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 23

e L. libertatem ff. de manumiſſ. teſtam. Covar. in cap. 3. de teſta. extr. *f* Schard. in L. 1. C. de Inſtit. & ſub. n. 6. in fin. *g* Tiraquel. de Privileg. piæ cauſæ, c. 57. *h* Graſſ. Theſaur. com op. § legatum, q. 58. n. 1. Et hæc opinio communiter approbatur, Alex. in L. 1. de Inſtit. & ſub. C.

Sect. IX. Whether he that is made Executor, or to whom any Legacy is given Conditionally, may, in the mean time, whiles the Condition dependeth, be admitted to the Executorſhip, or obtain the Legacy, by entering into Bonds to perform the Condition, or elſe to make Reſtitution.

1. *Divers kinds of Conditions to be remembred in this Queſtion.*
2. *When the Condition is Affirmative, it ſufficeth not to put in Bonds.*
3. *What if the Affirmative do alſo imply a Negative.*
4. *What if the Diſpoſition be made* Sub Modo, *and not* Sub Conditione.
5. *How* Modus *and* Conditio *do differ.*
6. *When the Teſtators Will is not repugnant, then it ſufficeth to put in Bond.*
7. *If the Condition be Negative, then what things are to be regarded.*
8. *If the Condition conſiſt in not doing, then it is material, whether the ſame may be accompliſhed during life.*
9. *If the Condition cannot be accompliſhed during life, then it ſufficeth to put in Bond, to the effect aforeſaid.*
10. *Example of ſuch Condition as cannot be accompliſhed during life.*
11. *The Reaſon of deviſing this Bond, and who was the inventer thereof.*
12. *Certain Caſes wherein the Legacy may be obtained without Bond, being given upon Condition, which may ſeem not to be accompliſhed during life.*
13. *If the Condition Negative may be accompliſhed during his life, to whom it is impoſed; this Caution hath no place.*
14. *A Condition Negative is ſaid to be accompliſhed when it cannot be infringed.*
15. *Great odds whether the Condition may be accompliſhed during his life, to whom it is impoſed, or not.*
16. *What if the Negative Condition cannot be infringed without ſorrow.*
17. *If the Condition conſiſt in not giving, then we muſt inquire and reſolve as in the Condition of not doing.*
18. *When the Condition doth conſiſt in not hapning, then this Bond hath no place.*
19. *The Form of the Bond, to whom it is to be made, and whether Sureties be neceſſary.*

IF any (1) be deſirous to know whether he that is made Executor, or to whom any Legacy is left by the Teſtator, under ſome poſſible Condition,

Condition, may in the mean time, whiles the Condition dependeth unperformed, be admitted to the Executorſhip, or obtain his Legacy ſo left, by entering Bond, or putting in ſufficient Caution, either to perform ſuch Condition, or elſe to make full reſtitution of all things by him received. It ſhall be behoveful to call to his remembrance how many kinds of Poſſible Conditions there be [a], eſpecially he muſt not forget, that of theſe Conditions, ſome be Affirmative, and ſome be Negative [b]. And again, that as well of the Affirmative, as of the Negative, there be three ſorts, that is to ſay, Some conſiſt in chancing, ſome in giving, and ſome in doing; and on the contrary, ſome conſiſt in not chancing, ſome in not giving, and ſome in not doing [c]. Now to apply theſe Diſtinctions to the Queſtion.

When (2) the Condition is Affirmative (whether it do conſiſt in chancing, giving, or doing.) He that is made Executor, or to whom any Legacy is given, under ſuch Condition, cannot be admitted to the Executorſhip, nor demand the Legacy by vertue of the laſt Will, or Teſtament of the deceaſed, ſo long as the ſame Condition dependeth unfulfilled, or is not extant [d], albeit the Executor or Legatary ſhould put in ſufficient Bond, to make reſtitution, in caſe the Condition ſhould be deficient. For the event of ſuch Affirmative Condition is to be expected, and muſt be extant before the Diſpoſition of the Teſtator can take effect [e], except in theſe Caſes following. One (3) when the Affirmative Condition which doth conſiſt in doing or giving, doth withal ſecretly imply or contain a Negative [f]. As for example, The Teſtator maketh his Wife Executrix, or giveth her a hundred pound, if ſhe abide with his Children; which Affirmative Condition (if ſhe abide with his Children) conſiſteth in doing, and doth withal ſecretly imply a Negative; that is to ſay, (if ſhe do not depart from his Children [g].) And therefore in this caſe, the Executor or Legatary, by entering into ſufficient Bond to perform the Condition, or elſe to make reſtitution, is to be admitted to the Executorſhip, or may obtain the Legacy, as if the Negative had been expreſſed [h]. Another Caſe is, When (4) the Diſpoſition is not made *Sub conditione, ſed ſub modo* [i]. For (5) thou ſhalt underſtand, that *conditio* and *modus* do differ: *Conditio* is a quality which ſo long as it dependeth unperformed, or is not extant, doth hinder the effect of the Diſpoſition, ſo that that thing which is diſpoſed conditionally, can neither be demanded, neither is due in the mean time [k]. *Modus* is a Moderation, whereby a charge or burthen is impoſed, in reſpect of a commodity; which Moderation doth not ſo far hinder the effect of the Diſpoſition, but that the thing diſpoſed is due, and may be demanded in the mean time [l]; and it is called *Modus a moderando.* The one of them is thus known from the other, that is to ſay, The Condition is commonly known by this word *(If)* or by words of like value [m], whereof I have given examples before [n]; the mean or moderation is known by this word (*That,*) as I make *A. B.* my Executor, or give him a hundred pound,

[a] De quibus ſupra eadem part. § 5.
[b] L. in facto, ff. de cond. & demon.
[c] D. L. in facto.
[d] L. Mutian. in ff. de cond. & demon. & gloſſ. ac DD. ibid.
[e] L qui hæredi. ff. de cond. & demon. DD. in d. L. Mutian.
[f] L. pater § ſocrus ff. de cond. & demon. Bar. & Paul. de Caſtr. in d. Mutianæ, Ripa. in L. ita ſtipulatus, ff. de verb. off. n. 46.
[g] Bar. & Paul. de Caſtr. in d. L. Mutianæ per d. § Socrus.
[h] Bar. & Paul. Caſtr. ubi ſupr. Simo de Prætis. de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 24, 25. fol. 42.
[i] L. 1. C. de his quæ ſub modo, L. quibus diebus § Termilius, ff. de cond. & demon. verum propriè loquendo, Cautio de modo impleto, non eſt cautio Mutiana, ſed alia ei ſimilis. Bald. in Auth. cui C. de indict. vid. n. 22. in fin.
[k] Bald. & Sichard. in Rub. de Inſtit. & ſub. C.
[l] Bar. in d. L. quibus diebus, § Termilius, de cond. & demon. ff. Sichard. in d. Rub. de Inſtit & ſub. C. Graſſ. Theſaur. com. op. § legatum, q. 58. Modus (inquit Cujacius) eſt finis, propter quem
[m] Bald. & Sichard.

legatur, vel cauſa legandi collata in futurum. Cujac. in tit. de his quæ ſub mod. C. in Rub. de Inſtit. & ſub C.
[n] Supra eadem part. § 5.

pound, that he may erect a Monument [o]. Now in this Caſe, when any thing is left under a Moderation, or with the Exaction of a Remuneration, that thing which is ſo bequeathed, is preſently due, and may now alſo be demanded, ſo that he which maketh demand, do enter into Bond in manner as hereafter is deſcribed, to perform that which is exacted by the Teſtator, or elſe to make full reſtitution [p]. Another Caſe is, when (6) the Teſtators Will is not repugnant thereunto; for then this Bond (as it is affirmed) hath place even in Affirmative Conditions [q].

When (7) the Condition is Negative, then we are to regard what kind of Negative Condition it is, that is to ſay, whether the ſame conſiſt in *not doing*, or *not giving*, or *not chancing*.

If (8) the Condition conſiſt in *not doing*, then it is material, whether the ſame may be accompliſhed ſo long as he liveth, on whom the ſame is impoſed, yea, or no.

If (9) the Condition conſiſting in not doing, *cannot be performed ſo long as the perſon on whom it was impoſed, liveth*, then may he obtain the bequeſt, by putting in Bonds to accompliſh the Condition, or elſe in defect thereof to make full reſtitution [r]. As for (10) example, the Teſtator maketh one his Executor, or giveth him a hundred pound, if he never play at the Cards or Dice. This Condition we ſee is Negative, it conſiſteth in not doing, and it is ſuch a Condition withal, as cannot be fully performed, ſo long as he liveth, on whom it is impoſed, becauſe at any time, during his life, he may infringe the ſame, by playing at the Cards or Dice [s]; for albeit, he did abſtain this day, yet might he play the next day, or if not the next day, yet ſome one day or other ſo long as he had any days to live [t]; and ſo in the mean time, that is to ſay, all his life long he ſhould not reap any commodity by the Teſtament, if the full performance of the Condition were firſt exacted. Wherefore (11) leaſt the Teſtators Will ſhould be uneffectual, and leaſt the Executor or Legatary ſhould reap no benefit thereby, if the full performance of the Condition ſhould be expected, ere the bequeſt could be obtained. One *Mutius Scevola* did deviſe this remedy, that he who is made Executor, or to whom any Legacy is bequeathed, upon a Condition Negative, which could not be fully performed during his life, ſhould enter into Bond to perform the Condition, (that is to ſay, never to do that which is prohibited, or elſe to make a full reſtitution) and by that means obtain the Executorſhip or Legacy [u]; which Bond or Caution is of *Mutius* the Author thereof, called *Mutiana Cautio* [x], and after a ſort hath the effect of the full accompliſhment of the Condition [y]. Yea, in ſome Caſes (12) the Legacy which is given under a Condition Negative conſiſting in not doing, may be obtained without any ſuch Bond, albeit the ſame Condition may be infringed during the life of the Legatary, namely, in a Legacy of Liberty or Freedom from Bondage [z], and in a Legacy *Ad pias cauſas* [a]. The reaſon of the difference is, becauſe in theſe favorable Legacies the Teſtator is preſumed to have meant only of the firſt act, when the Legatary had opportunity of doing the thing prohibited [b]. So that if

at

[o] Bar. in d. § Termilius & Sichard. in d. Rub. de Inſtit. & ſub. C.

[p] L. quibus diebus, § Termilius, ff. de cond. & demon L. 1. 2. C. de his quæ ſub modo.

[q] Bar. in d. L. Mutianæ, de cond. & demon. ff. n. 3.

[r] D. L. Mutianæ, & ibi Bar. Bald. & Paul. de Caſtr. Zaſ. in L. dedi tibi, ff. de cond. cauſ. dot.

[s] Simo de Prætis de interp. ult. vol. lib. 5. interp. 2. ſub. 1. n 23.

[t] Simo de Prætis ubi ſupr. Paul. de Caſtr. in d. L. Mutianæ.

[u] D. L. Mutianæ, cum gloſſ. ibid. Simo de Prætis ubi ſupra Zaſ. in L. dedi tibi. de cond. cauſ. dor. ff. n. 7. 9.

[x] Gloſſ. in d. L. Mutianæ.

[y] Bar. & Caſtr. in d. L. Mutianæ.

[z] L. libertatem, L. libertas, § 1. de Manumiſſ. teſta. ff.

[a] Tiraquel. de privileg. piæ. cauſæ, c. 18.

[b] Tiraquel. ubi ſupra.

at that ſeaſon or firſt opportunity, the Legatary do not infringe the Condition by doing contrary to the diſpoſition of the Teſtator; it is not hurtful, though after that firſt opportunity paſt, the Legatary go againſt the Condition [c], unleſs the meaning of the Teſtator do appear to be contrary, *viz.* That the Condition ſhould be extended to every act during the life of the Legatary [d].

But (13) if the Negative Condition be ſuch, *as may be performed during his life, on whom it impoſed.* This foreſaid Bond or Caution hath no place [e], and conſequently the Executorſhip or Legacy diſpoſed under ſuch Condition, ſo long as the ſame dependeth not fully performed, cannot be obtained [f]. For example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou never play at Dice or Cards with *A. B*; or, if thou do not at any time give away thy Lands to *A. B.* this Condition, howſoever it be Negative, and alſo conſiſteth in not giving, or not doing; yet it may be fully and perfectly compleat, and performed in thy life time: For *A. B.* with whom thou art forbidden to play, or to whom thou art forbidden to give thy Lands, may die before thee, and then thou canſt not play with him, nor give him thy Lands when he is dead; and ſo it is evident, that this Condition may be fully performed, and accompliſhed in thy life time, for a (14) Negative Condition is then ſaid to be fully accompliſhed, when it is brought to an impoſſibility [g]; and therefore in this Caſe thou canſt not be admitted Executor, nor obtain the Legacy, until the Condition be brought into that ſtate, that it cannot be infringed [h]. Great (15) odds therefore there is, betwixt thoſe Negative Conditions which cannot be performed in the life time of that perſon on whom they are impoſed, and thoſe Negative Conditions which may be performed during his life. For there the Executor or Legatary may obtain the Executorſhip or Legacy, by putting in Bonds, but here he cannot, unleſs it be (16) ſuch a Caſe as the event thereof doth bring grief and ſorrow to the party on whom the Condition is impoſed: For in ſuch Caſes, where the Condition cannot be infringed or become deficient, without ſorrow or heavineſs, it is lawful for the Executor or Legatary to enter into Bonds for making reſtitution, (if the Condition be not performed) and ſo to be admitted to the Executorſhip, and to obtain the Legacy in the mean time [i]. As for example, the Teſtator maketh his Wife Executrix, or giveth her a hundred pound, if ſhe depart not from her Children. This Condition may be extant in the life time of the Mother, for it may happen the Children to die, and the Mother to overlive, and then the Condition muſt needs be extant; for after their death, ſhe cannot infringe the Condition, by departing from them that are not. Nevertheleſs, becauſe the death of the Child is a hard and heavy thing to the Mother; therefore the Law is not ſo hard, but that in this Caſe the Condition depending, the Mother is to be admitted to the Executorſhip, and may recover the Legacy upon Bonds, to accompliſh the Condition, or elſe to make reſtitution [k].

[c] Gloſſ. in L. Titio § fundus, ff. de cond & demon. Tiraquel d. c. 48.

[d] L. ult. de manumiſſ. teſta. ff. Tiraquel. ubi ſupra.

[e] L. cum tale, § 1. ff. de cond. & demon. L. Pater. § Socrus eod.

[f] L. cum tale. § 1. & gloſſ. in d. L. Mutianæ.

[g] Gloſſ. & DD. in d. L. Mutianæ, ff. de cond. & demon.

[h] DD. in d. L. Mutianæ, & d. cum tale. § 1. S'mo de Præſis. de inter ult. vol. lib. 5. interp. 2. dub. 1. n. 13.

[i] D. L. cum tale, L. Peter. § Socrus ff. de cond. & demon.

[k] D. L. cum tale, & gloſſ. in d. L. Mutianæ.

When

When (17) the Condition doth conſiſt in *not giving*, then as before, we are to require whether the Condition be ſuch, as the ſame cannot be accompliſhed during his life, on whom it is impoſed: For if it be ſuch a Condition, that which is diſpoſed under ſuch a Condition, may be obtained by entering Bond, as before [l]. For example, the Teſtator doth make thee his Executor, or doth bequeath unto thee a hundred pound, if thou do not give away thy Lands [m]; this Condition cannot be fully performed but by thy death, becauſe ſo long as thou liveſt, thou mayeſt give away thy Lands, and ſo infringe the Condition [n]. Wherefore, leaſt the Teſtators Will ſhould be deluded, or thy ſelf defrauded, thou mayeſt be admitted to the Executorſhip, or obtain the Legacy in the mean time; ſo that thou become bounden as before, to perform the Condition, or elſe to make full reſtitution [o].

When (18) the Condition doth conſiſt in *not chancing*, then this Bond or Caution cannot be admitted, neither can the thing diſpoſed under ſuch Condition, be obtained before the Condition be performed [p]: And therefore (for example) if the Teſtator make thee his Executor, or give thee a hundred pound, if thy Ship do not return from *Spain*; in this Caſe, the event of the Condition is to be expected. And if it ſo come to paſs that thy Ship doth return, then is the Condition deficient, and ſo thou canſt not be admitted to the Executorſhip, nor obtain the Legacy by vertue of the ſaid Diſpoſition [q]. But if the Ship cannot return (which thing may happen by Shipwrack, or by ſome other accident) and ſo all hope or poſſibility taken away, then the Condition is ſaid to be accompliſhed or extant; and ſo thou art to be admitted to the Executorſhip, or mayeſt recover the Legacy, as if the Diſpoſition had been ſimple [r].

Now (19) that we have ſeen in what Caſes the aforeſaid Bond hath place, and in what Caſe it hath no place, it ſhall not be amiſs; in a word, to ſhew the manner and form of the Bond, and to whom it muſt be made, and whether Sureties be required. The Form thereof is this, (*Not to do that thing which is contained in the Condition; or elſe to reſtore the things diſpoſed, together with all the mean fruits and profits thereof* [s].) The Bond is to be made by the Executor, unto the Subſtitute [t], or him that is appointed Executor in place of him that is bound, if the Condition be not obſerved [u]. And if there be no ſuch Subſtitute, then to the Co-executor [x]; and if there be no Co-executor, then to the Ordinary, becauſe he doth, as it were, ſucceed where any dieth Inteſtate [y]. Likewiſe, the Legatary muſt enter Bond to him that is ſubſtituted unto him; if there be no Subſtitute, then to the Collegatary; if there be no ſuch, then to the Executor; if there be no Executor, then to the Ordinary [z]. There need no Surety neither for any thing immovable, nor for a thing movable, unleſs the party be not fit or ſufficient [a].

[l] D. L. Mutianæ ff. de cond. & demon.

[m] L. 4. §idem, Julianus, ff. de cond. inſtit.

[n] DD. in d. §idem, Julianus.

[o] D. L. Mutianæ, Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 13.

[p] D. L. Mutianæ, & ibi Bar. & alii.

[q] Bar. & Paul. Caſtr. in d. L. Mutianæ, L. unic. § ſin autem, C. de cad. tol.

[r] Idem Paul. de Caſtr. in d. L. Mutianæ, d. § ſin autem.

[s] L. cùm filius § qui Mutianam ff. de leg. 2.

[t] Bald. in Auth. cui relictum, C. de indict. viduitat. n. 20.

[u] Bald. in d. Auth.

[x] Idem Bald. ibid.

[y] Stat. Ed. 3. an. 18. c. 19. vel forte præſtanda eſt hujuſmodi cautio Mutiana adminiſtratoribus caſu, quo adminiſtratio ſit conceſſa.

[z] Bald. ind. Auth. cui relictum, C. de Indict. vid.

[a] D. Auth. cui relictum.

Sect.

Sect. X. Whether it be ſufficient, that the Condition was once accompliſhed, though the ſame do not continue.

1. *Many Caſes wherein it is ſufficient, that the Condition was once accompliſhed, though it do not ſo continue; and contrariwiſe, many Caſes wherein it is not ſufficient, that the Condition was once accompliſhed, unleſs it do continue.*
2. *The order to be obſerved in this diverſity of Caſes.*
3. *If the Condition be caſual, then it is ſufficient that the Condition was once accompliſhed.*
4. *Divers Examples of this Concluſion.*
5. *If the Condition be arbitrary, then it is not ſufficient, that the Condition was once accompliſhed.*
6. *Divers Examples of this Concluſion.*
7. *If the Condition be mixed, then it is ſufficient that the ſame was once accompliſhed.*
8. *Examples of this Concluſion.*
9. *What if the Condition indure not, by the fault of the party, by whom it is to be accompliſhed.*
10. *What if the party be already married, to whom any thing is bequeathed conditionally* (If he ſhall marry.)
11. *What if the Executor or Legatary were once willing, and afterwards unwilling; whether ſhall the condition be reputed for accompliſhed?*
12. *In this laſt Q. either hath divers Authors.*
13. *The opinion of the Author of this Book.*
14. *An Anſwer to an Objection.*
15. *Divers Limitations of the former Concluſion, whereunto the Author of this Book did ſubſcribe.*

MAny (1) Caſes there be, wherein it is ſufficient for the performance of the Condition, that the ſame was once accompliſhed; albeit the ſame do not ſtill indure in the ſame eſtate [a]. Other Caſes there be, wherein it is not ſufficient once to have performed the Condition, unleſs there be a continuance of the performance [b].

But becauſe it would grow to an infinite matter, to recite every particular Caſe [c], it is meet to ſet down ſome general Concluſions or Diſtinctions, whereunto and whereby all thoſe particular Caſes may be reduced and decided.

Firſt (2) of all therefore, we are to inquire the nature of the Condition, whether it be *caſual*, *arbitrary*, or *mixt* [d].

a Jaſ. in L. ſi quis hæredem C. de inſtit. & ſub. ubi tradita eſt regula non paucis ampliationibus & limitationibus illuſtrata.

b Jaſ. in L. in ſubſtitutione ff. de vulg. & pupil. ſub. ubi regulam tradidit ſex fallentiis exornatam.

c Qua in re nimium deſudaſſe videtur Jaſ. ut refert Ber. Diaz. Tract. reg. & fol. verb. conditio, reg. 110.

d De quibus ſupra eadem part. § 5. & Bar. in L. 1. de Inſtit. & ſub. C. Minſing. & Vigl. in §. Pen. Inſtit. de hæred. Inſtit.

If (3) the Condition *be meer caſual*, that is to ſay, ſuch a Condition, whereof the event is to us uncertain [e], then it is ſufficient that the ſame was once accompliſhed, though it do not continue ſtill in the ſame ſtate [f]. As (4) for example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if *A. B.* ſhall be Proctor of the Univerſity of *Oxford* [g]. Now if at any time after the making of this Will, *A. B.* be Proctor, whether after the Teſtators death or before, or whether he continue ſtill Proctor or not, it is not material [h]; yea, though he were depoſed from his Office, it skilleth not; it is ſufficient that once he was Proctor, the Condition being caſual; and ſo thou art to be admitted to the Executorſhip, and mayeſt obtain the Legacy, as though *A. B.* were Proctor ſtill [i]. So it is if the Teſtator make thee his Executor, or give thee a hundred pound, if *A. B.* ſhall be Doctor of the Civil Law, though afterwards he be degraded [k]. Likewiſe, if the Teſtator doth make thee his Executor, or give thee a hundred pound if his Daughter ſhall be Widow. In this Caſe, if his Daughter happen at any time to be Widow, thou mayeſt be admitted to the Executorſhip, or obtain the Legacy, albeit ſhe do afterward take a new Husband [l].

If (5) the Condition be *arbitrary*, that is to ſay, ſuch a Condition as the Law eſteemeth to be in our power [m]; then it is not ſufficient that it be once accompliſhed, unleſs it do continue [n]. As for (6) example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound if thou pay to *A. B.* Ten pound; thou payeſt Ten pound to *A. B.* and when thou haſt ſo done, thou takeſt it from him again. This payment is no payment, becauſe thou didſt not ſuffer the Money to continue with him; and therefore, in this Caſe, thou art worthily repelled from being Executor, or obtaining the Legacy [o]: So it is, if the Condition do include a continuance of time. As for example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if thou permit *A. B.* to have a way thorow thy ground. In this Caſe, it is not ſufficient, that thou permit him to have a way, or paſs thorow thy ground for a day or two, but thou muſt ſuffer him ſo long time as the Teſtator hath aſſigned, otherwiſe the Condition is not ſaid to be compleat [p]. But what if the Teſtator make thee his Executor, or give thee a hundred pound, if thou give Ten pound to *A. B.* thou of pity and compaſſion giveſt him Ten pound, being ignorant of this Condition: Whether is it ſufficient that thou didſt once give him Ten pound? In this Caſe, the Condition is not reputed for accompliſhed; and therefore if thou wilt be Executor, or obtain the Legacy, thou muſt once again give him Ten pound, as elſe where I have declared [q]: For where the Condition is arbitrary, it muſt be obſerved preciſely [r], unleſs it be in ſuch a Caſe as it cannot be iterated [s]. For example, thou art made Executor, or haſt a hundred pound bequeathed unto thee, if thou manumit thy Bondman, or if thou remit to *A. B.* Ten pound which he oweth thee: In which Caſe, if thou ſhalt grant liberty

[e] Supra eadem part. § 5. n. 14. Spiegel. Lexic. verb. fortuitum.
[f] L. ſi quis hæredem C. de Inſtit. & ſub.
[g] D. L. ſi quis hæredem cujus exemplum eſt. Si Titius fuerit Conſul, vel Prætor, &c. cui noſtrum exemplum non eſt diſſimile.
[h] D. L. ſi quis hæredem.
[i] Sichard. & alii in d. L. ſi quis hæredem.
[k] Zaſ. in L. in ſubſtitutione, ff. de vulg. ſub. n. 11.
[l] Bald. in L. fin. de indict. vid. C. Graſſ. Theſaur. com. op. § legatum, q. 53. referens ibi hanc op. eſſe veram. cui concinit Mantic. de conject. ult. vol. lib. 12. tit. 19.
[m] Sichard. in Rub. de Inſtit. & ſub. C. Viglius & Minſing. § Pen. Inſtit. de hæred. inſtituend.
[n] Bar. in L. 2. de cond. & demon. ff. Sichard. in L. ſi quis hæredem de Inſtit. & ſub. C. quorum opinio communis eſt, ex relatione Graſſ. Theſaur. com. op. § legatum, q. 57. n. 3.
[o] L. ſi ſoluturus ff. de ſoluc. & Angel. ibid. Sichard. in d. L. ſi quis hæredem, n. 6.
[p] Dec. & Sichard. in d. L. ſi quis hæredem de Inſtit. & ſub. C.
[q] Supra eadem parr. § 7. in princ. per gloſſ. & DD. in d. L. ſi quis hæredem, & Graſſ. Theſaur. com. op. § legatum, q. 52.
[r] Supra eadem parr. § 7.
[s] D. L. ſi quis hæredem, & per Sichard. ibid. n. 3.

to

to thy ſervant, or releaſe the ſaid debt of Ten pound, before thou know of the Conditional Diſpoſition, this act ſhall be accounted for an accompliſhment of the Condition, becauſe now thou canſt not do it again [t].

When (7) the Condition is a mixed Condition, then it is ſufficient that the ſame was once accompliſhed, though it do not ſo continue [u]. For example, (8) The Teſtator maketh his Daughter Executrix, or giveth her an hundred pound, if ſhe marry; ſhe marrieth; afterwards her Husband dieth, or they are divorced by occaſion of his fault: In this Caſe ſhe is to be admitted to the Executorſhip, or may obtain the Legacy, as if the Marriage had not been diſſolved, by Death or Divorce [x]. But if (9) her fault were the occaſion of the Divorce, it is more doubtful whether the Condition ſhall be accounted for compleat to her benefit [y]. In which Caſe nevertheleſs, their opinion ſeemeth the truer and ſounder, who hold, that the Law doth exact no more at her hands, by reaſon of this former Condition, but that ſhe marry, not that ſhe ſhould commit no fault, whereby the marriage muſt be diſſolved [z]: And therefore, having performed the Condition by marriage, the Divorce doth not repel her, the rather, becauſe ſhe did not offend of purpoſe, to infringe the Condition [a]. Indeed, if ſhe did marry only to obtain the Executorſhip or Legacy, not with purpoſe to continue a dutiful Wife, and afterwards commit adultery, whereby ſhe is ſeparated: The Condition is not ſatisfied by that marriage, and conſequently, ſhe can neither be Executrix, nor obtain the Legacy [b]. But, how may it be known, whether ſhe did marry with purpoſe only to obtain the benefit of the Diſpoſition, or with purpoſe to continue a dutiful Wife? The ſhortneſs of time betwixt the marriage, and the committing of the fault, doth declare: For if ſhe marry on the one day, and commit the crime on the next; this is a teſtimony that ſhe had not a meaning to indure the yoke of marriage [c]. Furthermore, if the marriage were not lawful from the beginning, either by reaſon of the minority of the perſon, or by reaſon of conſanguinity or affinity, the Condition is not reputed accompliſhed [d].

What (10) if the party whom the Teſtator maketh Executor, or doth bequeath any Legacy unto Conditionally (*if ſhe ſhall marry*) be already married at the time of the Will-making, whether by this marriage is the Condition ſaid to be compleat? If the Teſtator were ignorant of the marriage, the Condition is ſaid to be accompliſhed, otherwiſe not [e]; as hereafter is more fully declared.

What (11) ſhall we ſay to this Queſtion? The Teſtator maketh *A. B.* his Executor, or giveth him a hundred pound if he marry his Daughter; *A. B.* offereth to marry her, ſhe refuſeth; afterwards ſhe being willing, conſenteth, and then he refuſeth; whether in this Caſe ought *A. B.* to be admitted Executor, and may recover the Legacy, as if he had married her, yea, or no [f]? Indeed, if ſhe had never been willing or conſenting to be married, it were a clear Caſe, that

[t] Sichard. & alii in d. L. ſi quis hæredem de Inſtit. & ſub. C.

[u] D. L. ſi quis hæredem. Adde Gabriel. lib. 4. com. concluſ. tit. de fidei commiſſ. concl. 8.

[x] DD. in d. L. ſi quis hæredem.

[y] DD. in d. L. ſi quis hæred. quorum Bald. Sal. & Alex. in ea opinione ſunt, ut conditio non ſit completa: Sed Ang. Jaſ. Dec. & moderni fere omnes contrarium defendunt.

[z] Hoc tutius eſſe refert. Jaſon, verius eſſe refert. Dec. in d. L. ſi quis hæredem. Quia viz. Lex illa loquatur indiſtincte.

[a] Dec. in d. L. ſi quis hæredem, cujus opinio facilius admitti debet, quandoquidem apud nos pro crimine ſolum ipſum matrimonii aliàs debite riteque contracti vinculum non diſſolvatur, ſed ſeparatio tantum fit à menſa & à thoro.

[b] Dec. Sichard. & alii in d. L. ſi quis hæredem.

[c] Sichard. ubi ſupra. Arg. L. ventri § fin. ff. de privileg. cred.

[d] L. Pen. quando dies leg. ced. L. hæc conditio de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 22.

[e] L. ſi ita ſcriptum § ſi pater. ff. de leg. 2. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 16.

[f] De hac q. vide Menach. de præſump. lib. 4. præſump. 183. per tot.

seeing it stood not by him, wherefore the Condition was not accomplished, but by her, then the Condition should have been reputed in Law to have been accomplished [g], as hath been heretofore declared [h]. But the Case being altered, and she which was unwilling before, being now at length become willing and consenting, the Question is more doubtful [i]: Wherein very (12) many do hold the Affirmative, esteeming, that the Condition being once accomplished by her refusal, it is sufficient, though it do not so indure; and that in case, we are to respect the beginning, and not the success [k]. Others do hold the Negative, supposing the Condition ought not to be accounted for accomplished, unless he that is to reap the benefit by the performance thereof, do continue and persevere in readiness and willingness to perform the same, and that the least delay is ever hurtful [l].

Either opinion hath many Authors of great Authority; and albeit it may seem, That this Condition being a mixt Condition, not consisting in his own power alone, on whom it is imposed, but in hers also; that therefore being once accomplished, it is sufficient, though it do not so continue: As in the former examples of being Proctor, Doctor, Wife, or Widow, where the Conditions be reputed for fully performed, howsoever afterwards the Proctor be deposed, the Doctor degraded, the Wife divorced, or the Widow married.

Yet nothwithstanding for mine (13) own part, I do rather cleave to them which do hold the Negative opinion [m]; and so that howsoever in this Case *A. B.* were at the first willing and ready to have accomplished the Condition, and that it did not then stand by him, wherefore the same was not performed; yet afterwards she consenting and he dissenting, it is in effect, as if he had been unwilling at the beginning, and consequently, that he is not to be admitted Executor, nor to recover his hundred-pound by vertue of this Disposition.

To (14) the former Objection, that is sufficient, that a mixt Condition be once accomplished, though it do not so indure; as appeareth by those late recited examples. It may be answered, that there the Condition was once actually compleat, which was all that the Testator seemed to require [n] in those Cases: But here the Condition was never in act, and so the performance thereof came short of the Testators desire [o]. Wherefore, as I said before, I do rather subscribe to their opinion, who do hold that in this Case the Condition is no more reputed for compleat in Law, then it is in fact, and consequently that he can reap no benefit thereby, by whom it ought to have been performed [p].

And this opinion I suppose to be more agreeable to the meaning of the Testator, and therefore to be preferred [q], certain Cases excepted. (15) One Case is, where the Executor or Legatary upon the refusal of

[g] C. cùm non stat. c. imputari de reg. jur. 6.
[h] Supra eadem part. §. 8.
[i] Ut per DD. in L. 1, de Instit. & sub. C. & per Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 38.
[k] Bald. Sal. Alex. Sichard. in d. L. 1. C. de Instit. & sub. & Molin. in Apostil. ad Dec. in eand. L.
[l] Perr. Cyn. Fulgol. & alii in d. L. 1.
[m] Non tamen indistinctè ut infra hoc ipso § in fin.
[n] Jas. Dec. Sichard. & alii in d. L. 1. de Instit. & sub. C.
[o] Id quod clarè mihi constare videtur ex verbis testatoris dicentis (si duxerit filiam meam,) nec objicias per eum non stetisse, ex quo nunc stat. Sin adhuc urgeas conditionem tunc primùm pro implera haberi, quando per eum non steterit: Respondeo illud plus habere subtilitatis quàm æquitatis, quippe qui non credam satisfactum esse voluntati testantis unica nuptiarum oblatione, muliere postea consentiente, ita ut non subsecutis nuptiis legatum jure posci non possit.
[p] Fateor tamen contrariam opinionem dici communem, teste Sichardo in d. L. 1. de Instit. & sub. & quidem attenta juris subtilitate, eandem opinionem magis ferendam esse non prorsus nego; sed inspecta testatoris voluntate, non ita.
[q] Mens autem testatoris quàm diligentissimè investiganda, & tanquàm regina colenda est, ut ait Sichard. in Rub. de testa. C.

her

her offer, doth marry another Woman, ... pent, ſeeing from that time he hath juſt cauſe to refuſe her offer after he hath married another Woman [r]. Another Caſe is, when the Teſtator remitteth a debt which is due unto him: As for example, the Teſtator remitteth to *A. B.* a hundred pound which he oweth him, if he marry his Daughter, *A. B.* is willing and offereth to marry her; ſhe refuſeth, afterwards ſhe is willing. This new willingneſs doth not hinder the Legatary, being before delivered, and the action extinguiſhed by her refuſal [s]. Another Caſe is like unto this, when after the refuſal made by the Woman, and before her repentance, he whoſe offer was before refuſed, is admitted to the Executorſhip, and doth obtain his Legacy, and is poſſeſſed thereof: For notwithſtanding her repentance and new willingneſs, he may retain that whereof he was poſſeſſed [t]. Another Caſe ſeemeth to be this, namely, when ſome ſpecial thing is bequeathed. As for example, the Teſtator doth bequeath unto thee his white Horſe, or an hundred pound lying in his Cheſt, if thou marry his Daughter; for ſtraight way by her refuſal thou haſt gotten a certain Right in the thing bequeathed [u]. If there be any other Caſes wherein the Affirmative hath place, they are more ſtrange, nor eaſily like to happen, and therefore not ſo neceſſary to be known [x].

[r] Socin. in L. in teſto. el 2. ff. de cond. & demon. Mantic. de conject. ulf. vol. lib. 11. tit. 18. n 38. Menoch. d. præſump. 183. n. 29. l. 4.

[s] Mantic. ubi ſupra.

[t] Mantic. ubi ſupra. poſt Socin. in d. L. in teſto. el. 2. de cond. & demon. ff. Menoch. ubi ſupra. n. 30.

[u] Socin. ubi ſupra. huc pertinent quæ ſuperius dicta ſunt eadem part § 4. in Brook. Abridg. tit. Deviſe nu. 5, 30. Bald. Sal. & Alex. in L. 1. de Inſtit. & ſub. C.

[x] Vide Menoch. de lib. 4. præſump. 183.

Sect. XI. Of divers Conditions which may ſeem doubtful, Whether they be lawful or unlawful; and firſt of thoſe Conditions, whereby the liberty of making Teſtaments is hindered; how far the ſame are lawful or unlawful.

1. *Certain Conditions, whereof it may be doubted, of ſome, whether they be lawful or unlawful.*
2. *Captious Conditions deſtroy the Teſtament.*
3. *Captious Conditions, wherefore they be ſo termed.*
4. *Teſtaments are to be made with all freedom, not only without fear of loſs, but alſo without hope of gain.*
5. *This Propoſition, That captious Diſpoſitions are void, diverſly extended.*
6. *The ſame Propoſition diverſly limited.*
7. *Another kind of Condition againſt the liberty of making a Teſtament.*
8. *The Teſtament improperly termed Captious, which is referred to the Will of another.*
9. *The Teſtators Will may not depend of another Mans Will, and what is the reaſon thereof.*

10. *What*

... to whoſe Will the Teſtator did refer his own Will, ſhould make a Will in the name of the Teſtator.

11. *As another Mans Soul is not my Soul, ſo his Will and Teſtament is not my Will and Teſtament.*

12. *It is lawful for the Teſtator to refer his Will to the Will of another, being joyned with a fact.*

13. *So is it when the Teſtator doth refer his Will to the limited Will of another.*

14. *When is the Teſtator ſaid to refer his own Will to anothers abſolute Will, and when to his limited Will.*

15. *The Declaration of the Teſtators Will, may be referred to another.*

16. *What if Relation be made to the Will of the Executor or Legatary.*

17. *In favor of Liberty, the Diſpoſition may be referred to anothers Will.*

18. *So may the Diſpoſition which is made* Ad pias cauſas.

19. *He that doth commit all his Goods to the Diſpoſition of another, doth not die inteſtate.*

FOr as much (1) as there be divers Conditions, which be neither ſimply lawful, nor ſimply unlawful, but in divers reſpects lawful and unlawful, eſpecially thoſe Conditions, whereby the liberty of *making a Teſtament* [a], or the liberty of *marriage* [b], or the liberty of *alienating the thing diſpoſed* [c], may ſeem to be hindred or reſtrained: I thought it convenient in this place to ſhew how far, and in what Caſes theſe Conditions be lawful or unlawful, and what effect they have.

And firſt of all, (2) concerning thoſe Conditions which do impugn and hinder that liberty, which ought to be had in making of Teſtaments, and whereby the Diſpoſition of the Teſtator is ſaid to be Captious, or to depend of the Will of ſome other perſon: Such Conditions are unlawful, and do deſtroy the force of the Diſpoſition [d]; and (3) therefore, if the Teſtator make thee his Executor upon Condition, if thou ſhalt make him thy Executor; or give thee a hundred pound by his Teſtament Conditionally, if thou ſhalt give him a hundred pound in thy Teſtament. This kind of Diſpoſition is ſaid to be Captious [e], becauſe hereby the Teſtator goeth about to catch or intrap thee to make him thy Executor, or to give him a hundred pound, in caſe thou die firſt [f], and to hinder that liberty which thou ſhouldſt enjoy in making of thy Teſtament. For when thou haſt made him thy Executor and dieſt, then hath he that which he looked for; he is now thy Executor, and thou on the contrary art fruſtrated of that which thou perhaps didſt look for; for being dead, thou canſt not be his Executor [g]. And therefore (4) as in Marriages the ſame ought to be free, not only from fear of ſuffering loſs, but alſo from fear of not obtaining gain [h]: So in Teſtaments, the ſame ought to be made with all freedom, not only

[a] De qua conditione ſtatim ſubjic. cur hoc ipſo §.
[b] De quâ infra §. prox.
[c] De qua infra ead. part. § 13.
[d] L. Captatorias, de hæred. inſtituend. L. Captatoriæ, de leg. 1. ff. L. Captatorias, de mil. teſto. C. Covar. in c. cum tibi de teſta. ext.
[e] Illa enim voluntas propriè dicitur captatoria, quæ ſit ſub ſpe reciprocæ voluntatis. Covar. in c. cùm tibi de teſta. ext. Richard. in L. captatorias, de mil. teſton. C.
[f] Alciat. Perergon. lib. 2. c. 31. Auguſt. lib. 4. Emendac. c. 15.
[g] Vide Minſing. lib. 1. obſerv. c. 8.
[h] C. Gemmæ de ſponſ. extr.

without

without fear of punishment or loss, but also without hope of gain or reward [i].

And in this consideration, (5) these Captious Wills, whereby many under pretence of making others their Executors, or gratifying them with Legacies, do subtilly procure themselves to be made Executors, or otherwise to be benefited by the Dispositions of others, are so odious, that they are utterly void [k], albeit they be Military Testaments [l], or of the Father amongst his Children [m], or of a stranger [n], or Testaments *Ad pias causas* [o], or Testaments made in time of Wars [p], or Testaments made in the time of Pestilence [q], or Testaments made in the Prison of a Tyrant [r], or in place wherein is want of Witnesses [s], or before the Prince [t], or whether it be Testament or Codicil [u]; for in all these Cases, and divers other, such Captious Wills be void [x].

Notwithstanding (6) if the Condition be not referred to the time to come, but to the time past, or present, the Condition is not unlawful, nor the Disposition void: And therefore, if the Testator make thee Executor of his Testament, if thou hast named him Executor in thy Testament, or giveth thee a hundred pound in his Will, if thou hast given him a hundred pound in thy Will. This Condition is not unlawful [y]; for two persons may make either other Executors, or otherwise benefit one another by their Testaments, so it be done in regard of good will, and affection, and not in hope of gain or remuneration [z].

Besides this former kind of Disposition, which by reason of the Cunning Condition, appeareth to be made in hope of gain, and is therefore properly termed Captious; there (7) be other like Dispositions which be repugnant to the liberty of making of Testaments, which also are said to be Captious, that is to say, When the Testators Will doth depend of the Will of another [a]. As for example, the Testator maketh thee his Executor, or giveth thee a hundred pound, if *A. B.* will; or thus. The Testator maketh that person his Executor, or giveth him a hundred pound, whom thou wilt appoint [b]. In both these Cases, (8) the Disposition is said to be Captious [c], though not so fitly as commonly [d]. Nevertheless, the Condition is unlawful, because it is against the liberty of making Testaments, wherein (9) the Testators Will ought not to depend on the Will of another [e]. For the antient Law-makers considering, that if it should be lawful for Testators to refer their Wills to the Wills of others, and to depend upon them, then he on whom the Testator did depend, either not doing any thing at all, or else doing otherwise than the Testator would, by that means the Testator should remain deceived, and they to whom the Testator did wish well, should be disappointed [f]. For the avoiding of which inconveniences they did ordain, that every Testament should personally depend of the Testators own Will, and

i Sichard. in L. captatorias. C. de mil. testo. n. 6.

k L. illa. L. captatorias. de hæred. instituend. L. captatorias, de leg. 1. ff.

l L. captatorias. de mil. teston. C.

m Vasque de succes. crea. lib. 2. § 17. n. 28.

n Vasque ibidem.

o Nam quod dicitur captatoriam dispositionem valere quoad piam causam (ut in c. cum tibi de testa. extr.) Id verum est in captatoria dispositione improprie sic dicta quæ, viz. pendet ex alieno arbitrio, prout in d. c. cum tibi. & Covar. ibid. n. 2. & statim subjicitur, non autem quando dispositio sit sub spe remunerationis. Sarmientus lib. 2. select. op. c. 4. n. 8. c. 6. n. 33. Sichard. in d. L. captatorias.

p Vasquius de succes. crea. lib. 2. § 17. n. 83.

q Vasq. ubi supra.

r, *s*, *t*, *u*, *x* Ibidem.

y Sichard. in L. captatorias. d. mil. testo. C.

z Alciat. Parergon. lib. 3. c. 21. Covar. in d. c. cùm tibi de testa. extr. n 1.

a Covar. in d. c. cùm tibi de testa. extr.

b Canon. fiæ. in d. c. cùm tibi de testa. ext. Legistæ. in d. L. captatorias. de mil. testo. C. *c* DD. in d. L. captatorias, & in d. c. cum tibi. Grass. Thesaur. cons. op. § Instit. q. 18. *d* Alciat. Parergon. c 31. Covar. in d. c. cum tibi. Soarez. lib. rec. senten. verb. captatoris. An autem valeat hujusmodi dispositio, quære ut intr. d. §. *e* L. illa institutio. ff. de hæred. instituend. *f* Sichard. in L. captatorias C. de mil. teston. n. 4.

not

not of the Will of another, by whom the Testator might be deceived [g]. And (10) thence it is, that a Testament is defined to be a Sentence of our Will, not of another Mans Will [h]. Therefore, when thou art made Executor, or some Legacy is bequeathed unto thee (if *A. B.* will) as is set down in the former instance, although *A. B.* should will that thou shouldst be Executor, or have the Legacy. Notwithstanding, thou couldst neither be Executor [i], nor obtain the Legacy [k]. And even so where the Testator maketh that person his Executor, or giveth him an hundred pound, whom thou wilt appoint (as in the second instance) though thou shouldest appoint one, yet this appointment should not benefit him [l]: For (11) as thy Soul is not the Soul of the Testator, no more is thy Will his Will, or thy Testament his Testament [m]; neither is it in the power of the Testator to refer the substance of his Will to the Will of another [n], being such a quality as cleaveth to his own person, and cannot be committed to another [o], except in certain Cases.

The first is, when (12) the Testator doth not refer his Disposition to the sole only Will of another person, as in the former example, *viz.* If *A. B.* will; but to the Concrete Will, or Will joyned with a Fact [p]. As for example, the Testator maketh thee his Executor, or giveth thee an hundred pound if his Son shall go to the Church: This is a lawful Condition, and therefore the Condition being compleat, thou art to be admitted Executor, or mayest obtain the Legacy [q]. And yet there seemeth but a little difference betwixt these Conditions (if *A. B.* will) or (if *A. B.* shall go to the Church) for that it is in his Will, whether he will go to the Church, or not. But many things do greatly hurt, being expressed, which not expressed, do no harm [r].

Another Case is this, When (13) the Testator doth not refer his Will to the meer absolute Will of another, (as if *A. B.* will) but to his limited Will [s]. As for example, the Testator doth make thee Executor, or giveth thee a hundred pound (if *A. B. shall esteem it convenient.*) In which case, if *A. B.* shall esteem it meet or convenient that thou be Executor, or have the Legacy of an hundred pound, then thou art to be admitted to the one [t], or mayest obtain the other [u]. The (14) Testator is said to refer his Disposition, to *the meer absolute Will* of another, when he committeth the same to his Will, to his Lust, to his Appetite [x]: *To his limited Will*, when he referreth the same to his Discretion, Judgment, Wisdom, good Pleasure, Disposition and Conscience [y].

Thirdly, When (15) the Substance of the Testators Will is not referred, but only a Declaration or Election [z]. As for example, the Testator maketh one of his Servants his Executor, or giveth him a hundred pound, whom thou shalt chuse. In this Case, he whom thou

[g] Sichard. ubi supra. Peckius. in Tract. de testa. conjug. l. 1. c. 27.

[h] Supra 1. part. § 2, 3.

[i] L. illa institutio. ff. de hæred. instit. Paris. cons. 38. lib. 3. n. 60, 71.

[k] L. nonnunquam, de cond. & demon. L. captatoriæ. de leg. 1. ff. & est communis opinio, quam etiam defendit Covar. in d. c. cum tibi de testa. ext.

[l] Bar. in L. quidam de reb. dub. ff. n. 7, 8. Bald. in L. executorem. C. de execu. rei jud. n. 5. Paris. cons. 38. vol. 3. n. 9. Graff. §. institutio. q. 18. n. 4.

[m] Bald. & Angel. in L. captatorias. C. de inil. test. Vasq. de succes. creat. lib. 2. § 17. n. 81. Peckius, Tract. de testa. conjug. c. 27. n. 3. Paris. de consil. 38.

[n] D. L. illa institurio. ff. de hæred. instit. Bar. in L. quidam de reb. dub. ff. Peckius. Tract. de testa. conjug. lib. 1. c. 2. n. 3.

[o] Sarmientus. lib. 2. select. interp. c. 6. n. 2.

[p] L. nonnunquam. ff. de cond. & demon.

[q] D. L. nonnunquam. Sarmientus. lib. 2. select. interp. c. 6. n. 28.

[r] D. L. nonnunquam.

[s] Sichard. in d. L. captatorias, c. de inil. test.

[t] Sichard. ubi supra. quamvis quoad hæredis institutionem istud non procedit sine difficultate majori, jure civili. Sarmient. lib. 2. select. interp. c. 6. n. 4. [u] L. si fic. de leg. 1. L. 1. de leg. 1. L. fidei commissa de leg. 3. ff. [x] Menoch. de Arb. Jud. sentent. lib. 1. q. 7. [y] Jas. in L. si fic. de leg. 1. ff. Menoch. d. lib. 1. q 8. [z] Lutrum. §. cum quidam ff. de reb. dub. Bar. in L. quidam eodem tit. n. 8. Peckius. de testa. conjug. lib. 1. c. 27.

shalt

ſhalt chuſe of the Teſtators ſervants, ſhall be Executor, or recover the Legacy [a].

Another (16) Caſe is, when the Diſpoſition is referred to the Will of the Executor, touching the Executorſhip; or of the Legatary, touching the Legacy. As for example, the Teſtator maketh thee his Executor, if thou wilt; or doth give thee a hundred pound, if thou wilt: For this Condition is not only permitted, but it is neceſſarily required [b].

Another Caſe (17) is in favor of Liberty or Freedom from Bondage; and therefore, if the Teſtator do manumit his Villain, if his Executor will, it is as effectual, as if he had referred the ſame to the Diſcretion, or Wiſdom, or Conſcience of his Executor [c].

And further, when (18) the Diſpoſition is made *Ad pias cauſas*, then it is alſo lawful for the Teſtator to commit the very Subſtance of his Will, to the free and abſolute Will of another [d]; and therefore, if the Teſtator make the poor of the Pariſh his Executor, or give them a hundred pound, if *A. B.* will; this is a good Diſpoſition [e].

Finally, (19) If the Teſtator commit the Diſpoſition of all his Goods to another, this is lawful, and he to whom the Diſpoſition is committed, is underſtood to be made Executor, to diſtribute all the ſaid Goods *In pios uſus* [f]. So it is, if the Teſtator commit his Soul, and all his Goods, to the hands of another, as hath been heretofore declared [g].

[a] L. fidei commiſſ. de fidei com. lib. in fin ff. Pariſ. conſ. 32. l. 3. Graſſ. §. Inſtit. q. 18. n. 6. ubi ait hanc opinionem eſſe com.

[b] Supra eadem part. § 6.

[c] L. fidei commiſſa. de fidei commiſſ. l. ff. Sichard. in L. captatorias. C. de inſt. teſtam.

[d] Paul. de Caſtr. & Alex. in d. L. captatorias. Abb. conſ. 32. lib. 2. Boir. & Covar. in d. c. cum tibi. Bald. in c. in cauſis de elect. extr. quorum opinio eſt com. Graſſ. § Inſtitutio. q. 18.

[e] Et hoc procedit jure Can. non ſolum quoad legata, ſed etiam quoad Inſtitutionem. Covar. in d. c. cum tibi n. 12. referens hanc op. eſſe veriorem. Tu adde Gabr. lib. 6. com. concluſ. Tit. pia cauſa. concl. 3. ubi pulcherrime hanc concluſionem ornat variis ampl. & limitat. [f] C. cum tibi de teſta. extr. & ibi Covar. n. 10. Graſſ. d. § Inſtitutio. q. 18. Peckius de teſta conjug. lib. 1. cap. 27. Quorum teſtimonio hæc opinio eſt communis. [g] Supra eadem part. § 4.

Sect. XII. Of thoſe Conditions whereby the liberty of Marriage is reſtrained, *viz.* How far the ſame be lawful or unlawful.

1. *Of Conditions againſt the liberty of Marriage, ſome are lawful, ſome unlawful.*
2. *Conditions againſt the liberty of Marriage, are all unlawful, except in certain Caſes.*
3. *The Reaſons wherefore the Conditions againſt the liberty of Marriage, are unlawful.*
4. *The Prohibition of the firſt Marriage, more odious than of the ſecond.*
5. *The Condition of Marrying with the Arbitrement, Will, or conſent of another, is unlawful.*
6. *The reaſon wherefore the former Condition is unlawful.*
7. *The Condition prohibiting Marriage for a ſhort time, is not unlawful.*

8. *The Condition prohibiting Marriage with ſome perſons, is not unlawful.*
9. *Whether the Condition prohibiting Marriage, have reſpect only to the firſt Marriage.*
10. *An occaſion of Doubt, whether the former Concluſion be true.*
11. *An Anſwer to the ſame Doubt, diſtinguiſhing whether the Conditions be Affirmative or Negative.*
12. *The Condition prohibiting Marriage in ſome place, is not unlawful.*
13. *The Condition having Relation to the Marriage of a third Perſon, is not lawful, ſaving where that third Perſon is of kin.*
14. *The Condition prohibiting Marriage, is not rejected where* Pia Cauſa *is ſubſtituted.*
15. *Affirmative Conditions about Marriage, are not rejected but in ſome Caſes.*
16. *Some Affirmative Conditions of Marrying, harder than the Negative of not marrying.*
17. *The Condition of marrying with the advice or counſel of another, is not unlawful.*
18. *The Condition of marrying with the conſent of another, is to be obſerved in part.*
19. *Difference betwixt theſe Phraſes,* If he do not marry, *and,* So long as he doth not marry.
20. *The Condition of not marrying, doth not hinder Reſtitution ſimply impoſed.*

ALbeit (1) all thoſe Conditions, whereby the liberty of Marrying is wholly taken away, are generally diſliked [a]: Nevertheleſs, where the Conditions be ſuch, whereby Marriage is not altogether prohibited, but in part reſtrained, as in reſpect of time, place, or perſon, they are not to be utterly rejected [b].

Wherefore, that we may the better know when theſe kind of Conditions be admitted, or not, I thought it beſt, and the moſt eaſie way to ſet down a Rule, with Ampliations and Limitations of the ſame, according to the diverſity of Caſes, incident to that purpoſe.

The (2) Rule ſhall be this, *That all Conditions againſt the liberty of Marriage, are unlawful* [c]; and that whenſoever the Teſtator doth appoint his Executor, or make any bequeſt upon ſuch Condition, that then the Condition is void, as if it were not written; and that he who is made Executor, or to whom any Legacy is given upon ſuch Condition, may be admitted to the Executorſhip, or may obtain the Legacy, as if the Diſpoſition had been ſimple [d].

a L. quoties de cond. & demon. L. ſervo. § ſi teſtator. Ad. Trebel. ff.

b L. cum ita L. hoc modo. L. ſed ſi. § cum vir. de cond. & demon. ff. & infra hoc §.

c Eand. reg. tradit Vigelius in ſuâ methodo exactiſſima juris civilis, part. 4. lib. 14. c. 13. cum decem exceptionibus. Et licèt idem Vigelius poſtea exiſtimet contrarium jure novo conſtitui, ſtatuitur in primis nuptiis, in quibus vel hodie jus antiquum obtinet, ut verè atteſtatur Mantica de conject. ult. vol. lib. 11. tit. 19. in prin. Cui concinit Graſſ. Theſaur. com. op. aſſerens conditionem, qua in totum prohibetur matrimonium, in virgine turpem, contra bonos mores, atque adeo de jure impoſſibilem eſſe, denique communi Doctorum calculo rejectam § legatum. q. 50. & ita ſupervacaneas eſſe illius regulæ exceptiones, pace tamen tanti viri, nihil novi

d L. quoties, L. ſed ſi § fin. L. cum tale. § Meviæ. de cond. & demon. ff. L. 2. C. de indict. vid.

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The (3) Reaſon which the Lawyers do yield, (I mean) of the unlawfulneſs of this Condition, is, Becauſe it is contrary to the procreation of Children, and repugnant to the Law of Nature, and hurtful to the Commonwealth [e]: Whereunto it may be added, that howſoever Virginity is commended, yet Marriage is not thereby condemned, and therefore (as I ſaid before) if the Teſtator make one his Executor, or give him an hundred pound, if he do not marry; this Condition is unlawful, and as if it were not written [f]: Which (4) thing is rather true, if the Executor or Legatary were never married before, for the prohibition of the firſt Marriage is much more odious in Law than the ſecond [g]: For albeit it be commonly and truly ſaid, that the Commonwealth hath an Intereſt, that Teſtaments ſhould be executed [h], yet the Commonwealth hath a greater intereſt, that it ſhould be throughly peopled, and therefore Marriage not to be prohibited [i].

And in conſideration hereof, This rule is extended, that if (5) the Teſtator make ſome perſon his Executor, or give him any Legacy, if he marry according to the appointment, arbitrement or conſent of ſome other; this condition is rejected as unlawful [k]. And therefore in this caſe, if he that is made Executor, or to whom any Legacy in ſuch ſort is given, do marry contrary to the ſaid reſtraint, mentioned in the Teſtament, he is to be admitted to the Executorſhip, and may obtain the Legacy, as if no ſuch Condition had been expreſſed [l].

The (6) reaſon of the unlawfulneſs of this Condition is, leaſt he whoſe arbitrement were to be followed, or whoſe good will were to be procured, might make an hard choice for the Executor or Legatary, either by reaſon of the diſlike of the parties [m], inequality of age, diſparity of kinred, diſagreeing in manners, or ſuch like; which, if it were ſuffered, would breed greater miſchief, than may be in a caſe of that quality tolerated or indured.

Moreover, if the Teſtator do bequeath any Legacy to a Woman conditionally, if ſhe do not marry, willing her to reſtore the ſame to ſome other, if ſhe do marry: Albeit in this caſe the Woman do marry, ſhe may obtain the Legacy, neither is ſhe bound to reſtore the ſame [n], unleſs it were the meaning of the Teſtator, not to forbid Marriage, but to grant the uſe of the thing bequeathed, until the Legatary did marry [o]. Other extenſions there be alſo of this rule, but let us return to the Limitations.

The firſt Limitation therefore is, when (7) the Condition is not perpetual, but temporal [p]; as if the Teſtator make his Daughter Executrix, or bequeath her a hundred pound, if ſhe do not marry before the age of twenty years; this Condition is to be performed [q]. How-

[e] Mantic. de conject. ult. vol. lib. 11. tit. 19. in prin.

[f] L. quoties L. hoc modo. L. cùm ita legatum. de cond. & demon. ff.

[g] Iſtiuſmodi ſiquidem conditio, ſi permanſerit vidua, vel caſtè vixerit, in iis non rejicitur, in aliis ſecus. Auth. cui relictum. C. de indict. vid Covar. Epitom. de ſponſal. c. 2. § 9. n. 11. Graſſ. Theſaur. com. op. § legatum q. 50. quamvis eam non modo duram, ſed & iniquam exiſtimavit Peckius: Tract. de teſtam. conjug. l. 1. c. 24.

[h] L. Gallus § quid ſi is. de lib. & poſthu. L. vel negare quemad. teſta. app. ff.

[i] L. 1. ſol. matr. L. cum ratio. § ſi plures. de bon. dam. ff. Mantic. de conject. ult. vol. lib. 11. tit. 19. in prin.

[k] L. cùm tale § ſi arbitratu. d. § ſi Meviæ. Gravetta. conſil. 1. n. 3. Mantic. de conject. ult. vol. lib 11. tit. 18. n. 8.

[l] D. § ſi arbitratu. l. turpia. § ſi Titiæ. de leg. 1. ff. Gravetta. & Mantic. ubi ſupra Peckius de teſta. conjug. lib. 1. c. 24. n. 6. ubi dicit qua permittitur conditio viduitatis: Quod etiam aliis placet. ut Graſſ. d. § legatum. q. 50. n. 10. [m] Quam rationem communiter eſſe receptam refert Graſſ. Theſaur. com. op. § legatum. q. 50. n. 19. poſt DD. in d. L. turpia. § ſi Titiæ. [n] L. quoties de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 4. Graſſ. Theſaur. com. op. § legatum. q. 50. n. 7, 8. [o] Peckius de teſta. conjug. lib. 1. c. 24. L. ſed ſi § cum vir. de cond. & demon. ff. vide Saſin. in d. cenr. c. ſumit: § fin. de verb. ob. ff. [p] L. ſed ſi § cùm vir. ff. de cond. & demon. [q] Jaſ. in Auth. cui relictum. de indict. vid. C. Mantic. de conject. ult. vol. l. 11. tit. 18. n. 8.

beit, if the time of the Prohibition be ſuch, that it is very like, if ſhe ſhould continue a Maid, during that ſpace, that her Marriage ſhould be greatly hindred, the Condition is rejected, as being made in fraud of Marriage [r].

The ſecond Limitation is, when (8) the Prohibition doth only exclude ſome Perſons. As for example, The Teſtator doth make thee his Executor, or giveth thee an hundred pound if thou do not marry a Widow; this Condition is not unlawful [ſ]. And therefore, if at any time after thou do marry a Widow, thou canſt not be Executor, nor obtain thy Legacy: In ſo much, that (9) if thou ſhouldeſt marry a Maid, and after her death ſhouldeſt marry a Widow, all thy hope of being Executor, or obtaining thy Legacy is extinguiſhed by this thy ſecond Marriage [t]; much more is the Condition lawful, if the Teſtator make thee his Executor, or give thee any Legacy, if thou do not marry this or that particular Woman [u], for here thou haſt greater liberty, and more choice then in the former. Where (10) I ſaid that the hope and intereſt of the Executor or Legatary is extinguiſhed, if at any time he marry contrary to the Prohibition of the Teſtator, whether it be the firſt or the ſecond Marriage; this may ſeem doubtful: For that when mention is made of Marriage, it is to be underſtood of the firſt Marriage only [x]. And therefore, if the Teſtator make thee his Executor, or giveth thee an hundred pound if thou marry his Daughter; if thou after the making of this Will, ſhouldeſt firſt marry ſome other Woman, and after her death ſhouldeſt marry the Teſtators Daughter [y]; yet couldeſt thou not be Executor, nor obtain the Legacy: For in this caſe, the Teſtator is preſumed to mean of the firſt Marriage, not of the ſecond Marriage [z]. How then cometh it to paſs, that thou being made Executor, or having any thing bequeathed unto thee; if thou do not marry the Teſtators Daughter, loſeſt all thy hope and intereſt, whenſoever thou doeſt marry her, ſuppoſing thou hadſt married one, two or three before? The (11) anſwer is this, when the Condition is Affirmative, then it is to be underſtood of the firſt act only; but when the Condition is Negative, then not only the firſt act, but the ſecond, third, and every other act is perpetually forbidden [a]: The reaſon of the difference is, becauſe there is greater force in the Negative then in the Affirmative [b].

The third Limitation is, when (12) the Condition [c] is limited, only in reſpect of ſome place, as if thou doſt not marry in the City of *York*.

The fourth Limitation is, when (13) the Condition of not marrying, is not referred to the Executor or Legatary, but to ſome other perſon. As for example, the Teſtator maketh thee his Executor, or giveth thee an hundred pound, if his Daughter do not marry. In this caſe the Condition is not rejected, wherefore thou art to expect the event thereof [d]: For if ſhe marry, thou art excluded; if ſhe die un-

married,

[r] Jaſ. in d. Auth. eui. n. 3. per L. cum tale. ff. de cond. & demon. Fran. de Are. conſil. 67. Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 8.

[ſ] L. cum ita legatum ff. de cond. & demon. Peckius de teſta. conjug. lib. 1. c. 24. n. 4.

[t] Oldrad. conſil. 16. Alciat. in L. boves. §. hoc ſermone de verb. ſig. ff. & Tiraquel. n. §. limitat. 7.

[u] D. L. tum ita legatum Mant. c. de conject. ult. vol. lib. 11. tit. 19. n. 9. Peckius de teſtam. conjug. lib. 1. c. 24.

[x] D. L. boves § hoc ſermone.

[y] Paul. de Caſtr. in L. hoc genus ff. de cond. & demon.

[z] Tiraquel. in d. § hoc ſermone n. 3, 4. facit L. ma rimonii. ff. qui & à quibus ma.

[a] Oldrad. d. conſil. 16. Alciat. & Tiraquel. in d. § hoc ſermone Bar. & Paul. de Caſtr. in d. L. hoc genus. ff de cond. & demon.

[b] Plus negat negatio quam affirmat affirmatio, inquit Paul. de Caſtr. in d. Caſtr. in d. L. hoc genus.

[c] L. hoc modo. ff. de cond. & demon. Graſſ. Theſaur. com. op. § legatum. q. 50.

[d] Peckius de teſta. conjug. l. 1, c. 14. n. 10. d L. 1. C. de indict. vid. Mantic. de conject. ult. vol. lib. 1. tit. 19. n. 5.

married, thou art to be admitted [e]. But if the Teſtator make thee his Executor, or give thee an hundred pound, if thy Daughter do not marry: This Condition is unlawful [f]; for where the perſon whoſe Marriage is prohibited, is of thy near kinred which art made Executor or Legatary, it is likely that ſuch perſon will by thy perſwaſions abſtain from Marriage, to inrich thee by the Teſtament [g]; and therefore the Law to prevent ſuch fraud, hath rejected that Condition [h].

The fifth Limitation is, when (14) that which is given with Condition of not marrying, is to be diſtributed *In pios uſus*, in caſe the Condition be not obſerved. As for example, the Teſtator doth bequeath unto thee an hundred pound, if thou do not marry; and if thou doeſt marry, then he doth will that the ſame be diſtributed amongſt the poor Scholars of *Oxford*. In this caſe the Condition is not rejected as unlawful, and ſo if thou ſhalt marry, thou loſeſt thy hundred pound, and the ſame is to be diſtributed amongſt the ſaid poor Scholars [i]; the reaſon is, for that the Law doth more favor Piety, then the liberty to marry [k].

The ſixth Limitation is, when (15) the Condition is conceived Affirmatively, not Negatively. For example, the Teſtator maketh thee his Executor, or giveth thee an hundred pound if thou marry his Daughter [l], or if thou marry a Maid [m], or if thou marry within a Moneth [n], or if thou marry at *London* [o]: For albeit in theſe Affirmative Conditions, is alſo included a Negative, that is to ſay, If thou do not marry another Woman, nor at any other time, nor in any other place. Nevertheleſs, theſe Conditions are not unlawful, ſeeing the included Negative is not univerſal, but particular [p].

But (16) if the Woman appointed by the Teſtator be ſuch, as thou canſt not with honeſty marry her [q], then howſoever the Condition be Affirmative, yet in very truth it is a harder Condition, and more againſt the liberty of Marriage, then this Negative. (*If thou do not marry:*) For by this Affirmative, thou art not only excluded from marrying any other, but thou art, as far as is in his power, inforced to accept her, whom thou canſt not with thy credit marry [r]. And the like may be ſaid, if the time or place be not convenient; for then alſo the Condition is rejected [s].

The ſeventh Limitation is, when (17) by the Condition the Executor or Legatary is not to marry without the counſel or advice of another perſon [t]. As for example, the Teſtator doth make thee his Executor, or give thee an hundred pound, if thou do marry with the counſel or advice of his Brother; for if thou do marry without his counſel or advice, thou art excluded [u]. Nevertheleſs, in this Caſe, thou art not bound to follow his counſel or advice, but to requeſt the ſame [x]. So it was adjudged in *Pigots* Caſe, when the Father deviſed

[e] DD. in d. L. 1. C. de indict. vid.

[f] L. hæres meus § ult. de cond. & demon. ff.

[g] D. § ult & ib. Bar. & Paul. de Caſtr.

[h] Mantic. de conject. ult. vol. lib. 11. tit. 19. Ubi tradit alias limitationes.

[i] Paul. de Caſtr. in L. Titio. § ult. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 9.

[k] Mantic. ubi ſupra. Imol. in d. L. Titio. § ult. Tiraquel. de privileg. piæ cauſæ priv. 8.

[l] L. uter. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 2.

[m] Peckius Tract. de teſta. conjug lib. 1. n. 24.

[n] Mantic. d. tit. 18.

[o] Peckius d. c. 24. n. 5. in fin.

[p] L. cùm ita. L. hoc modo. ff. de cond. & demon.

[q] D. L. cum ita legatum.

[r] D. L. cum ita in fin. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 5. & Bar. in d. L. cùm ita, ubi reſpondit, quæ perſona ſit indigna tuis nuptiis, nempè illa, cui non poteſ ſine dedecore nubere, inſpecta natalium qualitate: Ne dum ſi jure vel civitatis moribus prohibeantur hujuſmodi nuptiæ, indigna erit perſona, & inutilis conditio. / Mantic. & Peckius, ubi ſupra. [s] Caſtrenſ. & Alex. in L. turpia. § ſi Titiæ. de leg. 1. ff. Bar. in L. 1. § ſi plures de exercic. action. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 10. [t] Mantic. ubi ſupra Aym. Graver. conſil. 1. Covar. de ſponſal. 2. part. c. 3. § 8. n. 3. [u] Paul. de Caſtr. conſil. 300. vol. 1. Felin. in c. ex part. de conſtit. extr. col. 2. Graſſ. Theſaur. com. op. § legatum q. 50. n. 11. Licèt impreſſio in illo loco ſit corrupta.

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an hundred pound to his Daughter *H.* upon Condition, that ſhe marry with the aſſent of her Mother, ſhe marries and ſues for the Legacy; and it was pleaded in Bar, that ſhe did not marry with the aſſent of the Mother: Notwithſtanding that, ſhe had a Sentence for the Legacy. Cited in *Griſtr.* and *Luthers* Caſe, *H.* 11 *Jac. Rot.* 1866. *Moores Rep. fol.* 857. *n.* 1176.

The eighth Limitation is this, where (18) it is ſaid before, that the Condition of marrying with the conſent, good will, and arbitrement of another, is void; (ſo that the Executor or Legatary, to whom the Condition is impoſed, is neither bound to obtain, nor yet to crave the conſent, good will, or arbitrement of that other) yet the perſon on whom the Condition is impoſed, cannot be Executor, nor get the Legacy, unleſs he do marry [y]: For though he need not ſo much as to crave the conſent, or good will of any third perſon in this Caſe, ſeeing that part of the Condition is unlawful; yet muſt he marry ere he can pretend any title to the Executorſhip or Legacy, ſeeing that part of the Condition is not unlawful [z].

The ninth Limitation is, when (19) the Prohibition of Marriage, is not made conditionally by this word *If*, (*as I make thee my Executor, if thou doeſt not marry,*) but by other words or Adverbs of time: As when the Teſtator willeth, that his Daughter or Wife ſhall be Executrix, or have the uſe of his Goods, *ſo long*, as ſhe ſhall remain unmarried [a]. Agreeable hereunto are the Laws of this Realm of *England*, wherein there is a Caſe, that one of the Kings of this Realm did grant to his Siſter the Manor of *D.* ſo long as ſhe ſhould continue unmarried. And this was admitted to be a good Limitation in the Law, but not a Condition [b].

The tenth Limitation is, when (20) the perſon on whom the Condition is impoſed, is ſimply charged to reſtore the thing bequeathed [c]. As for example, the Teſtator doth bequeath to thee an hundred pound, if thou do not marry, and he doth Will thee to reſtore the ſame to his Son, when he ſhall come to lawful years. In which Caſe thou art by Law to reſtore the ſame accordingly [d]: Neither is this Limitation contrary to the former ampliation of the Rule; for here thou art charged with Reſtitution ſimply, there conditionally [e].

y Alex. & Paul. Caſtrenſ. in d. L. Turpia. § 1. ff. de leg. 1.

z Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 8. poſt Alex. & Caſtrenſ. in d. § 1.

a Legatum ita eſt. de an. leg. ff. Peckius, de teſta. conjug. l. 1. c. 24. Zaſ. in d. L. centeſimis § fin. de verb. ob. ff.

b Fulb. paralætæ lib. 1. ubi plures authoritates citat. 7. Dialogo, fol. 47 a.

c L. non dubium ff. de leg. 3.

d D. L. non dubium, Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 4. Graſſ. Theſaur. com. op. § legatum. q. 50.

e Mantic. d. tit. 19. n. 4.

Sect. XIII. Whether the Condition forbidding Alienation of Goods bequeathed, be lawful or unlawful.

1. *Prohibition of Alienation is ſometimes to be obſerved as lawful, ſometimes not.*
2. *Prohibition apparelled with a Cauſe is lawful.*
3. *Naked Prohibition doth not bind the Executor or Legatary.*
4. *Whether the Feoffee may be prohibited to alienate.*
5. *Whether the Dower of Lands in Tail may prohibite Alienation.*

6. *As*

6. *As it is lawful to prohibite Alienation in favor of ſome perſons, ſo in diſfavor of others.*
7. *Of thoſe Cauſes wherewith the Prohibition is ſaid to be apparelled.*
8. *In what Caſes the Executor or Legatary may alienate the thing deviſed, notwithſtanding the apparelled Prohibition.*
9. *Bond ought to be put in where there is a Condition prohibiting Alienation.*

THe (1) Prohibition of the Teſtator forbidding the Executor or Legatary, to alienate the Goods bequeathed, is ſometimes to be obſerved as lawful, ſometimes not.

The Prohibition is then (2) lawful, and to be obſerved, when it is made in favor of ſome other perſon, who is to injoy the thing diſpoſed, after the Executor or Legatary, or when there is ſome ſpecial [a] cauſe; whereupon this Reſtraint is grounded.

[a] L. filius familias. § divi. de leg. 1. ff.

The (3) Condition is not of any force, when it is without cauſe, or not made in favor of any other perſon, ſave only of the Executor or Legatary [b]. In which Caſe, they may renounce this favor, and alienate the thing deviſed, notwithſtanding ſuch ſingle Prohibition, which is rather ſaid to be a Counſel, then a Commandment [c]: For the Law doth deem it an abſurd matter, that a Man ſhould be Lord and owner of a thing, and yet ſhould not at pleaſure alienate the ſame [d]. In which point alſo, I ſuppoſe that (4) the Temporal Laws of this Realm have the ſame effect in Lands, which the Laws Eccleſiaſtical and Civil have in Goods. And therefore if a Feoffment be made of Lands in Fee-ſimple, upon the Condition that the Feoffee ſhall not alienate or put away the ſame. This Condition is void, becauſe the Feoffee is without any cauſe, wholly reſtrained of that power which the Law yieldeth unto him in ſuch a Caſe [e].

[b] D. § divi.

[c] Jaſ. in d. § divi. n. 1.

[d] Jaſ. in d. § divi. n. 9. Doct. & Stud. lib. 1. c. 24.

[e] Brook. Abridg. tit. Condition. n. 135. Fitzh. tit. Condition. n. 4. Principal Grounds. fol. 28. Doct. & Stud. lib. 1. c. 24. Littleton. tit. Eſtates upon Conditions.

But when the Prohibition hath a cauſe annexed, or the ſame is made in favor of ſome other perſon, who is afterwards to injoy the Lands; then this Condition of not alienating the ſame, is good and effectual in the Law, as may appear by the gifts of Land in Tail. For if (5) Lands be given to a Man, and to the Heirs of his Body lawfully begotten, upon Condition, that neither he nor his Heirs ſhall alienate the Lands to any other perſon: This Condition is good and effectual. In which Caſe, if he or his Heirs, to whom the Lands are given, alienate the ſame, then the giver or his heirs may lawfully enter and retain the Lands for ever [f]. And (6) as it is not lawful to alienate from particular perſons, in whoſe favor the Prohibition is made; no more is it lawful to alienate to thoſe particular perſons, in whoſe diſfavor the Prohibition is made [g]. In which Caſe alſo concerning Lands, the Laws of this Realm do not differ from the Civil and Eccleſiaſtical Laws concerning Goods: For howſoever it is not lawful for the Feoffer to cut off the whole power of the Feoffee; yet he may abridge or reſtrain ſome part thereof, by Condition that he ſhall not alienate his Lands to ſuch or ſuch perſons [h].

[f] Fitzh. Abridg. tit. Condition. n. 4. Littleton. tit. Eſtates upon Conditions, f. 77.

[g] Alex. in d. filius familias, § divi. ff. de leg. n. 1.

[h] Brook. Abridg. tit. cond. n. 135. Littleton. tit. Eſtates upon Condition, fol. libri mei 77.

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The (7) Cause wherewith the Prohibition is said to be apparelled, besides these former respects of the favor and disfavor of persons, ariseth for the most part of the Testators affection towards the thing bequeathed. As when the Testator doth bequeath some Cup of Gold which was his Ancestors, forbidding the Executor or Legatary to alienate the same, but to keep it for a memorial [i]; or when he doth bequeath some Jewel, or other ornament, being the gift of the Prince [k]. And for that cause doth prohibite the Alienation thereof; or when he doth bequeath some prize by him gotten in the Wars, as a Sword, or an Helmet; and therefore doth forbid the Alienation thereof [l].

Which Prohibition in this sort is to be observed, as well as if it were in regard of some other person [m], except it be in certain Cases: for it is not perpetually true, that the Prohibition upon a Cause, or made in respect of some person, is to be observed.

The first Exception therefore of this Rule is, when the Alienation is necessary, not voluntary, that is to say, when the rest of the Testators Goods will not suffice to pay his Debts; for then it is lawful for the Executor to sell the same Goods prohibited to be sold [n].

The second is, when the Alienation is momentary, or of a short time, not perpetual, with a Covenant to restore the thing alienated again [o].

The third Exception is, when the thing bequeathed is in place far distant from him, to whom it is bequeathed, and who by reason thereof, cannot have any benefit thereby, if he should not alienate the same; for then the Prohibition of Alienation, being made in his favor, it seemeth, that he may alienate the same [p].

The fourth is, when the Alienation is made by him who is the last of the Family, in whose favor the Testator did prohibite the thing bequeathed to be alienated [q].

The fifth is, when the Executor being prohibited to alienate the thing bequeathed, except to certain persons, and he offering to sell the same unto them, they refuse to buy it. In which case he may sell the same to others, notwithstanding the Prohibition [r].

The sixth is, when the thing bequeathed was first sold to the person permitted by the Testator, for afterwards it may be simply sold to any other [s]. For example, the Testator doth bequeath a thing to *A.* upon Condition, that he shall not alienate the same to *B.* the Legatary, doth alienate the same to *C.* Which *C.* doth alienate the same to *B.* In this Case the Condition is not broken, because not the Legatary, but another did alienate the same to *B.* and so did not violate the same Condition expressed in the deceaseds Will [t].

The seventh is, when the Executor or Legatary doth sell the Fruits and Commodities of the things bequeathed, during his life [u].

Divers other Exceptions there be [x] concerning this present purpose, but because I do not see how there can be any great use thereof in the Ecclesiastical Court, I have omitted the same, aiming especially at these Cases, whereof there is like to be most use, and most benefit to the

[i] L. si in emptione. de Minor. ff. Paul. de Castrens. in d. § divi.
[k] Alex. & Ripa. in d. § divi.
[l] Alex. & Ripa. ubi supra.
[m] D. L. filius famil. § divi.
[n] D. § divi. in fin. L. peto. § prædium ff. de leg. 2. Jas. & Ripa. in d. § divi.
[o] Angel. in L. voluntas. C. de fidei Commiss. Ripa. in d. § divi. n. 10. ubi limitat hanc exceptionem duobus modis.
[p] Bald. in L. voluntas C. de fidei commiss.
[q] Jas. & Ripa. in d. § divi.
[r] Jas. in Rep. d. § divi. n. 8. per L. qui Romæ § cohæredes. ff. de verb. o.
[s] Jas. in Rep. d. § divi n. 76. per. L. pater. § quindecim, ff. de leg. 3.
[t] Fulb. paralel. lib. 2. parr. Tit. Conditions, fol. 69.
[u] Jas. in Rep. d. § divi n. 84. post Bar. in L. Codici. § Institutio. ff. de leg. 2.
[x] De quibus. Jas. & Ripa in d. § divi. & Vigil. in suâ methodo jur. civil. part. 4. l. 14. c. 11. in prin.

the Reader: Only this thing I thought good to add in this place, that where the (9) Teſtator doth make an Executor, and give him the reſidue of his Goods Conditionally, if he do not alienate the ſaid reſidue of Goods, the Executor cannot be admitted to the Executorſhip, unleſs he firſt enter into Bonds, not to alienate the ſame *y*.

y L. 4. § idem Julianus ff. de cond. Inſtit. & ibi Bald. Jaſ. Cui, Mutiana & Ripa in d. § divi. quæ ſententia firmior erit exiſtente cohærede, ſeu coexecutore. præſtari poſſit cautio.

Sect. XIV. Within what time the Condition may, or ought to be performed, no certain time being limited by the Teſtator.

1. *In this Queſtion, three times, and three Conditions are to be conſidered.*
2. *Whether the Condition may be performed before the making of the Will.*
3. *When the Condition is arbitrary, the ſame muſt be performed after the death of the Teſtator.*
4. *What if the Arbitrary Condition be ſuch, as the ſame cannot be iterated.*
5. *What if the Arbitrary Condition have relation to the time paſt.*
6. *Caſual and mixed Conditions may be performed before the making of the Teſtament, if the Teſtator were ignorant of the performance.*
7. *If the Teſtator did know of the former performance, it muſt be performed again if it be poſſible.*
8. *Whether the Condition may be performed, during the time, betwixt the making of the Teſtament, and the death of the Teſtator.*
9. *Within what compaſs of time, may, or ought the Condition to be performed after the death of the Teſtator.*
10. *The Condition being Arbitrary, it is not material whether the Condition be impoſed on the Executor or Legatary.*
11. *The Executor may at any time accompliſh the Arbitrary Condition after the Teſtators death.*
12. *Whether the Ordinary may limit a certain time for performance of the Condition.*
13. *The Legatary muſt perform the Arbitrary Condition, ſo ſoon as he can.*
14. *The reaſon wherefore the Executor hath longer time of performing an Arbitrary Condition, then the Legatary.*
15. *No time doth prejudice the Legatary, whiles he is ignorant of the Conditions.*
16. *If the Condition be caſual, it may be accompliſhed at any time.*
17. *What if the Condition be extant after the death of the Legatary.*

18. *If the Condition be mixed, it may be performed at any time.*
19. *What if the Condition do concern Marriage, whether ought it to be performed within three years.*

IF (1) we will understand within what compass of time, the Condition, whereupon the Executor is made, or any Legacy bequeathed, may, or ought to be performed, where there is not any certain time limited by the Testator, we are to consider three several times, and three several sorts of Conditions.

Of the three times, The first is the time *before the making of the Testament*; the second is, *the time betwixt the making of the Testament, and the death of the Testator*; the third is, *the time after the death of the Testator* [a].

Touching the Conditions we are to consider, whether the same be *Arbitrary*, *Casual*, or *Mixed* [b]. For the (2) time before the making of the Testament, if any do inquire, whether within that time, the Condition may be performed? It is to be answered, That (3) if the Condition be Arbitrary, that is to say, such as doth consist in his power on whom it is imposed, the same cannot be performed, but after the death of the Testator [c]. For example, the Testator maketh thee Executor, or giveth thee an hundred pound, if thou wilt go to the Church, or if thou wilt give ten pound to the poor: In this Case it is not sufficient that thou didst go to the Church; or that thou didst give ten pound to the poor any time before the making of the Testament; or yet after the making of the Testament, before the death of the Testator: For an Arbitrary Condition must be performed after the Testators death [d], saving in some Cases. One (4) is when the Condition cannot be iterated; for then it is sufficient, that the same was performed in the life time of the Testator, even before the making of the Testament [e]. For example, the Testator maketh thee Executor, or giveth thee an hundred pound, if thou shalt remit unto *A. B.* the debt which he oweth thee, and burn the Obligation; which thing is by thee already done. In this Case it is sufficient that thou hast done it, seeing it cannot be iterated [f]. And this I suppose to be true, not only if the Testator be ignorant of the performance of the Condition [g] (for it is not likely that he would have imposed any Condition to have been performed, if he had known the same to have been performed before, and that it could not be performed again) but also, if he did know the Condition to have been performed before; in which Case, the Condition not being iterable, is impossible, and so rejected, the Disposition remaining pure and simple [h]. Another Exception is, when (5) the Condition is referred to the time past. For example, the Testator maketh thee his Executor, or giveth thee some Legacy, if thou hast done this or that thing [i]. In which Case it is not only

a L. si jam facta. ff. de cond. & demon.

b L. unic. § sin autem C. de cad. toll. & supra eadem part. § 5.

c L. 2. de condit. & demon. ff. L. si quis hæred. de Instit. & sub. C.

d Gloss. & DD. in d. L. si quis hæredem, & hoc etiam fieri debet non fato aut casu, sed animo & studio implendi conditionem, ut habet communis omnium interpretum sententia, teste Grass. Thesaur. com. op. § legatum, q. 57. & huc faciunt quæ superius dicta sunt eadem part. § 7. in princ.

e L. si jam facta. L. hæc condit. ff. de cond. & demon. Paul. de Castr. in d. L. si quis hæredem, n. 4.

f L. hæc conditio el. 1. ff. de cond. & demon. Bar. in L. 2. de cond. & demon. Paul. de Castr. & Sichard. in L. si quis hæredem, de instit. & sub. C.

g D. L. si jam & facta & L. hæc conditio, el. 1. ff. de cond. & demon. & eo loci Interpretes.

h Grass. Thesaur. com. op. § legatum, q. 57. in fin. per L. quæ sub. conditione § quoties ff. de cond. inst.

i L. talis institutio. de cond. instit. L. cum ad præsens ficer. pe. ff.

sufficient,

ſufficient, that the Condition was performed before the making of the Teſtament, but it is neceſſary that it ſhould ſo be, for obtaining the Executorſhip or Legacy [k].

But if (6) the Condition be not Arbitrary, but either Caſual or Mixed, that is to ſay, either wholly without the power of the perſon, on whom it is impoſed, or partly in his power, and partly in the power of ſome other [l]; then it is material, whether the Teſtator were ignorant of the accompliſhment of the Condition, when he made his Teſtament, or not: For if the Teſtator, when he made his Teſtament, were ignorant that the Condition was performed before, the ſame is deemed to be ſufficiently compleat [m]. Example of the Caſual Condition; the Teſtator maketh thee his Executor, or giveth thee an hundred pound, if his Ship ſhall return from *Venice*. This Ship is returned already, but the Teſtator is ignorant thereof, at the time of making his Teſtament. In this Caſe the Condition is ſufficiently extant, as if the ſame had returned after his death [n]. Example of the Mixed Condition; the Teſtator doth make thee his Executor, or giveth thee an hundred pound, if thou take a Wife; thou haſt a Wife already, but the Teſtator did not then know ſo much, when he made this Condition. In this Caſe alſo thou art reputed to have ſufficiently accompliſhed the Condition [o].

But if (7) the Teſtator were not ignorant thereof, but did know of the return of his Ship, and of thy Marriage, at the time when he did impoſe the Condition; then the Condition is not reputed to be extant or accompliſhed: But *it is* to be underſtood of the next return, and of thy next Marriage [p]. Howbeit, if the Condition were ſuch, that the ſame could not be iterated, then it ſhall be reputed for extant and accompliſhed; albeit, the Teſtator at the time when he did impoſe the Condition, were not ignorant of the accompliſhment thereof. For example, the Teſtator maketh thee his Executor, or giveth thee an hundred pound, if thou ſhalt be Baptiſed, or if thou ſhalt take his Daughter to Wife: For it is ſufficient, albeit the Teſtator did know thee to be Baptiſed before, or that thou haſt taken his Daughter to thy Wife before, ſeeing the Condition cannot be iterated [q].

Concerning (8) the ſecond time, that is to ſay, the time betwixt the making of the Teſtament, and the death of the Teſtator; if any be deſirous to know, whether the Condition may be performed, during this time, I refer him to that which hath been ſaid immediately before; that is to ſay, either the Condition is Arbitrary; and then it is not ſufficient to perform the ſame, ſo long as the Teſtator liveth, unleſs it be ſuch a Caſe as cannot be iterated, or that the Condition doth reſpect the time paſt, or elſe the Condition is Caſual or Mixed; and then it is ſufficient that it is compleated whiles the Teſtator liveth. For ſeeing it is ſufficient, if it be performed before the making of the Teſtament, much more if it be performed after the making of the Teſtament.

Concerning (9) the third time, which is the time after the Teſtators death, if we would now alſo know within what ſpace or compaſs of

[k] D. L. inſtitutio talis.

[l] Bar. in L. 1. C. de Inſtit. & ſub. ſupra eadem part. § 5. in fin.

[m] D. L. ſi jam facta. ff. de cond. & demon. d. L. ſi quis hæredem C. de inſtit. & ſub.

[n] L. hæc conditio, § ſi ſic. ff. de cond. & demon. & d. L. ſi quis hæredem.

[o] Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 16. per d. L. ſi quis hæredem & d. L. ſi jam facta.

[p] L. ſi ita ſcriptum ff. de leg. 2. Mantic. de conject. ult. vol. tit. 18. lib. 11. n. 16.

[q] L. quæ ſub conditione § quoties. de cond. inſtit. L. hæc conditio. el. 1. & L. ſi jam facta de cond. & demon. ff. L. ſi quis hæredem de inſtit. & ſub. C. & DD. in dictas LL.

time immediately from his death, the Condition may or muſt be performed, no certain time being preſcribed by the Teſtator, we muſt firſt inquire the nature of the Condition, obſerving diligently as before, whether the ſame be Arbitrary, Caſual, or Mixed; for according to the diverſity of the Conditions, Law hath determined diverſly.

In the firſt caſe, *viz.* When (10) the Condition is Arbitrary, we are to conſider, whether the ſame be impoſed on the Executor, or on the Legatary. If the (11) Condition be impoſed on the Executor, the ſame may be performed at any time, ſo long as the Executor liveth [r]. For example, the Teſtator maketh thee his Executor, if thou ſhalt give to the poor ten pound. In this caſe thou mayeſt at any time, during thy life, accompliſh the Condition; and it is of the ſame effect, as if thou hadſt performed the ſame immediately after the Teſtators death [s], unleſs the (12) Ordinary do appoint a certain competent time for the performance thereof: For ſo he may do in this caſe (as hereafter is more fully declared [t]) within which time, if thou do not accompliſh the Condition, he then may commit the Adminiſtration of the Goods of the deceaſed, as of one dying Inteſtate [u]. If the (13) Condition do appertain to the Legatary, then the ſame muſt be performed ſo ſoon as the Legatary conveniently may perform the ſame, or elſe the Legacy is loſt [x]. For example, the Teſtator doth bequeath unto thee an hundred pound if thou wilt go unto the Church, or give Ten pound to the poor. In this caſe, ſo ſoon as thou art well able to go to the Church, or to give the Ten pound after the death of the Teſtator, thou muſt perform the Condition, otherwiſe thou haſt loſt thy Legacy [y]. The (14) reaſon of the difference betwixt the Executor and Legatary in this reſpect, is, Becauſe greater prejudice may grow to the Executor, by undertaking the Executorſhip, then to the Legatary by accepting the Legacy. And therefore, in Equity the Executor ought to have longer time to deliberate of the performance of the Condition, and undertaking of the burden of the Executorſhip, then the Legatary, to whom no prejudice at all may happen, or not ſo much as to the Executor [z]. Notwithſtanding (15) if the Legatary were ignorant of the Teſtament or Condition, ſo long as he is ignorant, no negligence is to be imputed unto him, nor any prejudice doth grow unto him, by not performing the Condition, as otherwiſe it might, if he had known thereof [a].

In the ſecond caſe, that is to ſay, When the Condition (16) is Caſual, then the event thereof is to be expected; and whenſoever the ſame ſhall be extant, then may he that is made Executor, or to whom any Legacy is left upon ſuch Caſual Condition, be admitted to the Executorſhip, or obtain the Legacy, and not before [b]. As for example, the Teſtator maketh thee his Executor, or giveth thee a hundred pound, if his Ship return from *Venice*. In this caſe, whenſoever the Ship ſhall return from *Venice*, during the life of the Executor or Legatary, then is he to be admitted to the Executorſhip, and may obtain the Legacy, but not before [c]. So that (17) if he die in the mean time, the

[r] L. ſi quis inſtituatur § 1. de hæred. inſtit. ff.

[s] Gloſſ. Bar. & Bald. in d. § 1. Graſſ. Theſaur. com. op. § legatum, q. 57. n. 2.

[t] Infra eadem part. § 16.

[u] Bar. Bald. Paul. de Caſtr. in d. L. ſi quis § 1. & infra eadem part. § 16.

[x] L. hæc conditio ff. de cond. & demon. Dec. in L. 1. de inſtit. & ſub. C.

[y] Bar. in d. L. hæc conditio. Alex. in L. ſi inſulam. n. 24. Ripa. n. 103. de verb. ob. ff. quæ opinio communiter eſt recepta, ait Graſ. Theſaur. com. op. § legatum, q. 57. n. 2.

[z] Graſſ. ubi ſupra Bar. Bald. Caſtr. & alii in L. ſi quis § 1. ff. de hæred. inſtit.

[a] Bald. in L. 1. C. de Inſt. & ſub. n. 20.

[b] L. intercidit. de cond. & demon. L. fidei commiſſa, § ſic fidei commiſſ. in fin. de leg. 3. ff.

[c] D. L. intercidit. L. unic. § ſin autem. C. de cad. tol. Tiraquel. de retract. § 1. gloſſ. 2. n. 25.

the Executorſhip or Legacy ſhall not be tranſmitted to his Executors or Adminiſtrators, although the Condition be extant afterwards [d]; unleſs ſome Legacy be left unto the Prince, who, if he die before the Condition be extant, yet is the ſame due to his Succeſſors, in whoſe time the Condition is extant [e]; or unleſs it be the Will and Meaning of the Teſtator, that the ſame be tranſmitted: For the Teſtator, if he will, may make the ſame tranſmiſſible, which otherwiſe is not tranſmiſſible [f].

In the third caſe, that is to ſay, when the (18) Condition is mixed, then the ſame may be accompliſhed at any time, as in Caſual Conditions, except the Condition be of Marriage [g]. But if the Teſtator (19) make thee his Executor, or give thee an hundred pound, if thou marry: In this caſe, very many be of this opinion, that thou oughteſt to marry within three years [h]. Others are of a contrary opinion, and that it is ſufficient to marry at any time, either within three years, or after [i]. In which Contrariety of Opinions, I ſuppoſe, That if the Executor be appointed upon Condition, if he marry, that then he may at any time accompliſh the ſame, not only within three years, but after [k]. But if a Legacy be given upon Condition, if the Legatary marry, then it is the common opinion of the Writers, that the Legatary muſt be married within three years, or elſe the Condition is ſaid to be deficient, and ſo is the Legacy loſt [l]. And albeit the other opinion is ſaid to be truer, that the Condition is ſufficiently accompliſhed by marrying after three years [m], yet the Judge may not eaſily depart from the common opinion: For whatſoever is affirmed for the truth of the ſingular opinion; yet that is preſumed to be the truer opinion, which is more commonly received [n]. The reaſon of the difference wherefore the Legatary is excluded rather then the Executor, if he do not marry within three years (as is before ſhewed,) is, namely, for that the Executor otherwiſe is ſubject to more peril then the Legatary [o].

d L. liber § ſi ita de hæred. inſtituend. L. in teſtam. de cond. & demon. ff. L. unic. § ſin autem C. de cad. tol. Zaſ. in L. ſi decem. ff. de verb. oblig.

e L. quod principi. ff. de leg. 2.

f L. in conditionibus § 1. ff. de cond. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 20.

g Jaſ. in L. 1. de Inſtit. & ſub. C.

h Bar. in L. 2. § ad filiorum, C. quando & quibus quarta pars. Jaſ. Sichard. & alii in L 1. C. de Inſtit. & ſub.

i Paul. de Caſtr. in d. L. 2. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 23.

k Paul. de Caſtr. in d. d. 2. Graſſ. Theſaur. com. op. § legatum, q 46. n. 18. l Bar. Jaſ. Dec. Sichard. & alii in d. L. 2. quorum opinio communis eſt, in quit Graſſ. Theſaur. com. op. § legatum, q. 46. n. 18.

m Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 23. Graſſ. ubi ſupra. *n* Coraſius, Tract. com. op. lib. 2. caſ. 14. *o* Ut ſupra in pluribus.

Sect. XV. Of the underſtanding of this Condition, *viz.* If he die without Iſſue.

1. *Manifold Queſtions by occaſion of this Condition,* If he die without Iſſue.
2. *Whether he be ſaid to die without Iſſue, whoſe Iſſue is natural, but not lawful?*
3. *What if the Father and Mother do afterwards marry together?*
4. *When the Iſſue is lawful, not natural, whether he be ſaid to die without Iſſue?*
5. *What if the Child were got by another Man before Marriage?*

6. *If*

6. *If another have to do with the Wife beſides her Husband, yet the Child ſhall be deemed the Husbands.*
7. *Divers Extenſions of this Concluſion.*
8. *What if the Child be like the Adulterer?*
9. *How comes it to paſs that the Child is ſometimes liker unto another, then him which did beget it?*
10. *In ſome Caſes the Husband ſhall not be judged the Father of the Child begotten, during Marriage.*
11. *Whether ſhall the Child be the former, or the ſecond Husbands, when it is uncertain whether of them did beget him?*
12. *Whether he be ſaid to die without Iſſue, who had Children, but not at his death?*
13. *Difference betwixt this Condition*, If he die without Iſſue, *and this*, If he have no Iſſue.
14. *Whether that Father is to be deemed to die without Iſſue, whoſe Child is unborn when he dieth?*
15. *Whether he be deemed to have died without Iſſue, whoſe Child dieth ſo ſoon as it is born?*
16. *If the Child be heard to cry, the Father ſhall be tenant by the courteſie.*
17. *What if the Child were not heard to cry?*
18. *What if the Iſſue be born dead, or dieth as it is born?*
19. *What if a Monſter be born; whether ſhall the Parents be judged to have died without Iſſue?*
20. *What if the Child in the Mothers Womb, being made Executor, ſhe be delivered of divers Children at one birth, whether ſhall every of them be Executors?*
21. *What is to be obſerved in Legacies, where more are born at one birth?*

AS there (1) is no Condition more uſual then this, *(If he die without Iſſue)* ſo there is none that doth miniſter more queſtions (although ſome of them be not altogether ſo difficult:) Which thing that it may the better appear, let us firſt ſuppoſe that the Teſtator doth make thee his Executor, or doth bequeath unto thee an hundred pound, if he die without Iſſue. This Caſe doth miniſter all theſe Queſtions, What if the Teſtator have *Iſſue natural, but not lawful?* Or, what if he have *Iſſue lawful, but not natural?* What if he have *Iſſue both natural and lawful, but the ſame dieth before the Father?* Or, what if he beget his Wife with Child, and *then die before the Child be born?* Or, what if the *Child die before it be born?* Whether ſhall the Teſtator be judged to die without Iſſue, yea, or no? All theſe and many more like Queſtions, may be demanded by reaſon of that Condition *(if he die without Iſſue,)* whereunto I ſhall anſwer in order as they be propounded; preſuppoſing, that to have Iſſue, is to have a Child or Children; and to die without Iſſue, is to die without any Child.

When (2) the Iſſue is *natural, but not lawful*, if the Will and Meaning of the Teſtator do not appear, the Teſtator is deemed to have

have died without Iſſue [a]. For it is not likely that an honeſt perſon, ſpeaking of Children, did mean of Baſtards, but of lawful Children [b]; inſomuch, (3) that if the Teſtator do beget a Child, and after the birth of the Child marry the Mother; yet in this Caſe I am of this opinion, that by the Laws of this Realm he ſhall be judged to have died without Iſſue. For thou ſhalt underſtand, that in the time of King *Henry* the Third [c], this Queſtion being propounded in the Parliament, *Whether one born before Matrimony might inherit, as one born after Matrimony?* All the Biſhops anſwered and ſaid, That it was againſt the common order of the Church, that ſuch ſhould not inherit [d]; and they all inſtanced the Lords Temporal and Barons then aſſembled in Parliament, that they would conſent, that all they that were born before Matrimony, ſhould be Legitimate, as well as they that were born within Matrimony, concerning the ſucceſſion of Inheritance, for as much as the Church accepted ſuch as Legitimate. But they all with one voice anſwered, that they would not change the Laws of this Realm, which hitherto had been uſed and obſerved [e].

When (4) the Iſſue is *lawful, not natural*: By lawful Iſſue in this place, I underſtand that Child which is begotten of a married Woman, by another then her Husband [f]; (for of adoption, arrogation, or any other means to make Children lawful, except Marriage, we have no uſe here in *England* [g]:) In this Caſe, firſt of all the meaning of the Teſtator is to be regarded [h], the which if it do not appear, then it ſeemeth by the Laws of this Realm, that he is reputed not to have died without Iſſue, but as if he had got it himſelf; becauſe by the ſame Laws [i] it is provided, (5) That if a Man take to Wife a Woman which is great with Child by another that was not her Husband, and after the Child is born within eſpouſals of Marriage: He which married the Woman, ſhall be ſaid to be the Father of the Child, and not he which did beget the ſame, although the Child were born the next day after the Marriage ſolemniſed [k]: For whoſe the Cow is, as it is commonly ſaid, his is the Calf alſo [l]. 18 *Edw.*4. *fol.*28. *Inſt. part.*1. *fol.*244 *a.*

Much more (6) if, after the Marriage, another Man have carnal conjunction with his Wife, ſhall the Husband be deemed the Father of that Child, which is not only born, but begotten during Marriage: For then, by all Laws, the Husband is preſumed to have begotten the Child himſelf, and not the Adulterer [m], albeit another had to do with her beſides her Husband. Which (7) concluſion, becauſe it is in favor of Matrimony, and tendeth to the benefit of Children, is diverſly extended.

Firſt therefore, although the Mother do cohabit with the Adulterer, yet if the Husband have free acceſs unto her, he is preſumed to be the

a L. in concitionibus de cond. & demon. L. ex facto. § ſi quis rogatus, ad Trebel. L. vulgo de ſtatu hom. ff. Mantic. de conject. ult. vol. 1 b.11. tit. 9. in prin. Sichard. in L. generaliter. § cum autem C. de inſtit. & ſub. Brac. de leg. & conſue. Angl. lib. 5. c.30. n.10. in fin. Fleta, lib.6. cap.38. Forteſ. c.39. 11 Aſſ. pl. 20. Inſt. parr. 2. fol.97. Inſt. parr. 1. fol. 123. 14 Chr. Dy. fol.312. 14 Chr. Dy. fol.345.

b Ripa. in d. L. ex facto. § ſi rogatus ad Trebel. ff. n. 6. Graff. Theſaur. com. op. § fidei. commiſ. q.37. n.6.

c Merton. c.9. anno 20 H. 3.

d Per. c.1 & c. tanta. qui filii ſunt legit. extr. § ult. Inſtit. de nuptiis c. nullum. 3. q.5.

e Merton. c.9. anno 20 H. 3.

f Bracton. de conſuet. Angl. lib.2. c.29. n.4. verb. & licet.

g Trac. de Republica Angl. lib.3. c.7.

h D. § ſi quis rogatus L. ult. C. de his qui væn. ærar. imp. L. Sancimus. de nuptiis. C. Mantic. de conject. ult. vol. lib. 11. tit. 8. in prin.

i Brac. ubi ſupra Fitz. Abridg. tit. Baſtardy. n. 1, 4. Brook eod. tit. n.43. in fin. Trac. de repub. Angl. lib. 3. c.6.

k Juxta illud. pater eſt quem nuptiæ demonſtrant. *l* Quod tamen non eſt ſimplici et verum in viduis, ut per *Terms of Law*, verb. Baſtardy, & infra d. §. *m* L. filiam. de his qui ſunt ſui vel alien. jur. L. miles, §. defun . de adul. ff. & ibi Legiſt. c. Michael. de fil. Presbyt. c. per tuas de probat. extr. & ibi Canoniſtæ. Brac. de leg. & conſuetud. Angl. lib.2. c.29.

Father,

Father, and not the Adulterer [n]. For albeit it be likely that the Adulterer did beget the Child, yet seeing it is possible that the Husband did beget it. Honest possibility is preferred before that other possibility which is linked with dishonestly [o].

Secondly, albeit the Wife were as common as the Cart-way, making an open profession of her filthiness; yet the Husband, if she be not altogether out of his guard, shall be judged the only Father [p].

Thirdly, albeit the Mother had been barren a long time before, yet the Child is presumed to have been begotten by the Husband, and not by the Adulterer [q].

Fourthly, albeit the Mother do confess that the Adulterer did beget the Child, yet her sole confession doth not hurt the Child [r].

Fifthly, albeit the Child be born blind, or lame, yet is the Husband presumed to have begotten the same, and not the Adulterer [s]. In which case, nevertheless some have been of this opinion, that this Child was begotten in Adultery [t], being so born (as they imagined) by Gods Providence and Justice, because of the sin of the Parents; whose rash opinion is by others refelled as erronious and blind [u], having no better ground then had their conceit, who asked of our Saviour Christ (as he passed by a blind man) who had sinned, he or his Parents, that he was born blind [x]. To which demand our Saviour answered, neither he nor his Parents, but that the power of God might be made manifest [y].

Sixthly, albeit (8) the Child be very like the Adulterer, yet shall the Husband be deemed the Father [z]. Wherein divers (I confess) of no small authority have contended mightily, that this Child is to be adjudged the Adulterers [a], fortifying their Assertion with this Reason especially, because in other Creatures, Nature hath so provided, that each thing doth beget that which is like unto it self [b]; yet contrariwise, their opinion hath prevailed (as being armed with Arguments of the invincible truth,) who defend that the Husband ought to be judged the Father of that Child, which is so like the Adulterer, and so unlike himself [c]. Neither is that other Reason of such force as is pretended, because (9) this Form or Similitude may happen to the Infant, by the Mothers serious cogitation or firm imagination at the time of the Conception [d]. For proof whereof, we may read in the holy Scriptures, how by *Jacobs* device of the spotted sticks being laid before *Labans* Sheep at the Ramming time, the Lambs became spotted [e]. Famous also is that accident (Registred in the Books of sundry

[n] Bald. in L. si à matre C. de suis & legit. Ab. in c. accedens de purg. canon. extr. Mascard. de probat. verb. filius concl. 788.

[o] Bald. in d. L. filium, de his qui sui, vel alien. jur. ff. Palæotus de Noth. & Spur. c. 24.

[p] Cyn. post Jac. de Butr. in L. si minus, C. de nup. Gab. lib. 1. tit. de præsump. concl. 14. n. 9. Mascard. de probat. d. concl. 788. n. 39.

[q] Ab. in c. per tuas de probat. extr. Alciat. de præsumpt. reg. 3. præsumpt. 37. Gab. d. conclus. 14. n. 8.

[r] Ab. in c. officii's de pœniten. extr. quod procedit etiamsi matris confessio accederet, Palæot. de Noth. & Spur. c. 24. n. 2. Alciat. de præsumpt. reg. 3. præsumpt. 37. n. 6. Petr. Duen. Tract. reg. & fal. verb. filius, reg. 344. cont. Bald. Arch. & Alex. de quibus Gabr. d. conclus. 14. n. 13.

[s] Covar. Epitom. de sponsal. 2. part. c. 8. § 3. n. 8. Mascard. d. conclus 788. n. 81. Petr. Duen. d. reg. 334. limit. 1.

[t] Barba in c. præsentia de probat extra. & in cons. 68. in prin. vol. 4. Alex. Autores quamplures. cap. 5.

[u] Covar. de sponsal. c. 8. § 3. n. 8. part. 2. Duen. d. reg. 344. in fin.

[x] Evangel. S. Johan. c. 9. in prin.

[y] Exod. c. 9. vers. 3.

[z] Bald. in L. Gallus, de lib. & posth. ff. n. 13. Paul. de Castr. consil. 257. vol. 3. Alciat. d. præsumpt. 17. n. 3.

[a] Alberic. in L. 7. ff. de stat. hom. Paris. consil. 10. vol. 2. n. 59. Bald. cons. 390. vol. 2. Fulgos. consil. 212. col. 3. Coras. L. 2. Miscel. cap. 22. num. 5.

[b] Paris. Coras. & alii, ubi supra. Tiraquel. de legibus, Connub. leg. 7. Mascard. de probat. conclus. 792. n. 2.

[c] Bar. Jas. & communiter DD. in L. Gallus, ff. de lib. & posth. quam sententiam propiùs ad veritatem accedere refert Mascard. de probat. d. conclus. 792. n. 7.

[d] Alciat. de præsumpt. 3. post Bald. in d. L. Gallus unde mulieres simulacra sæpissimè statuásque in deliciis habuisse legitur, similesque iis partus enixas Cornel. d. c. 22. n. 2.

[e] Gen. c. 30.

Writers f)

Writers [f]) of a beautiful Lady, who having a Husband of a fair and white Complexion, was delivered of a Child as black as Pitch, like unto a *Moor* or *Ethiopian:* And hereupon being accused of Adultery, she was acquitted and absolved, for that by the opinion of the best learned in Physick and Philosophy; the same did so come to pass by reason of the Picture of a Black Boy, or little Nigro, which did hang in the Bed-chamber, at the time of the Conception. Like unto this, is that credible History of another Woman in the time of *Charles* the Fourth, Emperor and King of *Bohemia*; who, because she had too much regard to the Picture of S. *John*, cloathed in a Camels Skin, which did hang at the Beds-feet, during the Conception, she brought forth a Child all rough, covered with Hair like unto a Bear [g]. The Histories are full of these kind of accidents, I shall content my self with one more, which did befal in the time of the Emperor *Maximilian*, in a Town in *Brabant* [h]: There in a publick Play or Spectacle, a certain Man whose part was to play a Dancing Devil, assoon as the Play was ended, ran home to his Wife in his Devils attire; and being moved in spirit [i], catched his Wife hastily in his arms, and must needs, *&c.* in that habit, saying, *He would beget a Devil*; and so it came to pass, that at her Childs birth she was delivered of a Devilish Monster, which as soon as it was born, began to leap and dance like to the Father. Which examples (with divers other like experiments) being made notorious, many Women (that they might bring forth beautiful Children) have gotten beautiful Pictures, and fixed the same nigh to their Beds, and have indeed oft-times brought forth Children like unto those Pictures, in the sight whereof they were formerly most delighted [k]. Seeing then the conceit or imagination of the Woman is of such force in the Act of Generation, that whose Form or Similitude is then in their mind, the same is not seldom represented in the Child [l]. What marvel then if the Child which is begotten by the Adulterer be like unto the Husband, when the Adulteress fearing to be interrupted by his return, who would take but small pleasure at such sport, cannot but still have an eye to that door, until the peril be past [m]? And wherefore then also should we wonder, that the Child which is begotten by the Husband, should be like to the Adulterer [n], upon whose face and favor her mind is fully fixed, who in the midst of her delights, imagineth the stoln water to be the sweeter [o]. Nay rather, it is to be marvelled that it should be otherwise, but that the Almighty doth still reserve his Prerogative, besides, and contrary to the course of Nature, bestowing what forms it best liketh him, upon every Creature. Other extensions there be of this Rule [p], but let us return to the Limitations.

The first Limitation is this, when (10) the Husband was not within the four Seas at such time as the Child was conceived [q], or at the least was so far absent from his Wife, or imprisoned at the same time,

[f] Jas. in L. Gallus, ff. de lib. & posth. n. 69. Coras. lib. 2. Miscel. c. 22. Fenton de secretis Naturæ, c. 5.

[g] Coral. in annotat. super quodam Arresto. Tholos. fol. 31. Fenton ubi supra.

[h] Coral. in d. annotat. eod. fol. 31. Ludovic. Vives in 12. lib. Aug. de Civit. Dei.

[i] Viz. in concupiscentia. Vide Translationem versic. 16. c. 12. lib. Judith in vulgare nostrum Idioma.

[k] Plutarch. de placitis Philos. lib. 5. c. 12. Coras. in d. c. 22. n. 2. lib. 2. Miscel.

[l] Glos. in L. quæret aliquis, de verb. sig. & in L. non sunt. de stat. hom. ff.

[m] Alcia. de præsump. reg. 3. præsump. 37. Jas. & alii in d. L. Gallus ff. de lib. & posth.

[n] Bald. in d. L. Gallus Mascard. de probat. verb. filius concluf. 792.

[o] Prov. Salo. cap. 9. v. 17.

[p] De quibus Mascar. de probat. d. concl. 788. Petr. Duen. tract. reg. & fal. reg. 344. Alciat. de præsumpt. 37. Menoch. de Arb. Jud. sent. 89. Gabriel de præsumpt. concluf. 14. conf. Angl. lib. 1. cap. 9. in fin. & lib. 2. cap. 29. num. 3 & 4. Kitchin tit. Bastardy, n. 4.

[q] Bract. de legat. & discent. fol. 108. Brook. tit.

that thereby it was impossible for him to have begotten the same Child [r]. Which time of Conception when it was, may best be known by relation to the birth of the Child: For a Woman cannot bring forth a perfect Child before the beginning of the seventh Moneth [s]; neither can she bear a Child in her Womb, after the end of the tenth Moneth, from the time of the Conception, at least, by presumption of Law [t], except it be (9) for one, two, or three days more at the very farthest [u].

It was found by Verdict, that *Henry*, the Son of *Beatrice*, which was the Wife of *Robert Radwill*, deceased, was born *Per undecim dies post ultimum tempus legitimum mulieribus constitutum*: And thereupon it was adjudged, *Quod dictus* Henricus *diei non debet filius prædicti* Roberti *secundum legem & consuetudinem* Angliæ *constitutam*: Now *tempus legitimum* in that Case appointed by the Law, at the furthest, is nine Moneths or Forty weeks, but she may be delivered before that time. *Trin.* 18 *Edw.* 1. *Rot.* 61. *Bedford coram Rege*: And this agreeth with that in *Esdras*, *Vade & interroga prægnantem, si quando impleverit novem menses suos; adhuc poterit matrix ejus retinere partum in semet ipsa? & dixi, non potest Domine*, *Esd.* 4. 41.

Edmond Andrews died the Three and twentieth of *March*, *Anno* 1610. *A.* his Wife being *privatment en soint*, but not delivered until 5 *Jan.* 1611. which was forty weeks and nine days, and then delivered of a Daughter, named *Elizabeth*, adjudged the Issue legitimate, and no Bastard. *Mich.* 17 *Jac. B. R. Alsop, vers. Bowhet. Croke, part.* 2. *fol.* 541. Though the usual time for a Woman to go with Child, be nine Moneths and ten days, *viz. Menses Solares*, that is thirty days to the Moneth, and not *Menses Lunares*; yet by reason of want of strength in the Woman or Child, or by reason of ill usage, she may be a longer time, *viz.* to the end of ten Moneths, or more: And so both Antient and Modern Authors, and Experience, prove. And as a perfect Birth may be at seven Moneths according to the strength of the Mother, or of the Child it self, which is as long before the time of the publick Birth; so by the same reason it may be deferred by accident, which is commonly occasioned by infirmities of the Body, or Passions of the Mind. The Record, *Trin.* 18 *Edw.* 1. was produced, but not much regarded, because it saith, That Child was born *undecim dies post tempus constitutum*, but doth not say *post quadraginta septimanas*. What shall be said to be the time, *mulieribus pariendo constitutum*. See Sir *Thomas Ridlies* View of the Civil Law, *fol.* 55. where he relates of a Widow in *Paris* that was delivered of a Child the Fourteenth Moneth after her Husbands death; yet the Judges adjudged the Child to be legitimate. The like Judgment was given in the *Consistory* at *Witenburgh*, in case of a Woman who was brought to Bed in the Eleventh Moneth after her Husbands death, *vid. Cornad. Manseri partem secundam de Matrimoniis, cap.* 36. *fol.* 150. *Selden de Successionibus, fol.* 22. *Crokes Anatomy, lib.* 6. *fol.* 336.

By the Laws of this Realm, if the the Husband be within the four Seas, that is, within the Jurisdiction of the King of *England*, if the Wife

[r] Cap. ex tenore, de testib. extr. & Panor. ibid. Parisi. consil. 64. vol. 3. n. 6, 7. & consil. 10. vol. 2. n. 36, 78. Mascard. de probat. conclus. 788. n. 40. Petr. Duen. d. reg. 344. limit. 3. Brook. Abridg. tit. Bastardy, n. 4.

[s] L. septimo de stat. hom. ff. ex sententia Hippocratis lib. de partu septimestri, à quo non dissentiunt Aristotel. lib. 2. De natura animal. Plutarch. lib. 5. de placit. Philos. c. 18. Plin. lib. 11. natural. hist. cap. 31.

[t] L. interest. 20. § ult. ff. de suis, & legit. & § ult. Tiraquel. in rep. L. si unquam C. de revoc. don. verb. susceperit, ubi multa scitu non indigna de partu septimestri & decimestri, ex Hippocrate, Aristotele, & aliis, tum Medicis, tùm Philosophis deprompta, videre licet. Sed præ cæteris Legistis, præclarissimè & copiosissimè de nascendi tempore, scripsit Gentilis noster.

[u] Accurs. in d. § ult. Auth. dor. stir. & ea quæ pariu, &c. Salmo in L. Gillus, de lib. & posth. ff. Menoch. de Arb. Jud. quæst. lib. 2. cas. 89. n. 41.

Wife hath Iſſue, no proof is to be admitted to prove the Child a Baſtard (for in that Caſe, *Filiatio non poteſt probari*) unleſs the Husband hath an apparent impoſſibility of Procreation; as if the Husband be but eight years old, or under the age of Procreation. Such Iſſue is Baſtard, albeit he be born within Marriage. *Bract. lib.* 4. *fol.* 278, 279. 7 *Hen.* 4. 9. 43 *Edw.* 3. 19. 41 *Edw.* 3. 7. 44 *Edw.* 3. 10. 29 *Aſſ.* 54. 8 *Aſſ.* 14. 1 *Hen.* 6. 7. 19 *Hen.* 6. 17. 39 *Edw.* 3. 12.

Secondly, If the Husband were not able to beget a Child, at ſuch time as his Wife did conceive, he is not to be deemed the Father of that Child [x]; in the conſtruction of the deceaſeds right [y]. For ſeeing Law is but an art of right and good [z], by imitation of nature [a], it were againſt all right and reaſon that he ſhould be judged the Father of that Child, by fiction of Law, which he could not beget by poſſibility of nature [b]. Whether he were diſabled by grievous ſickneſs [c], (eſpecially ſuch whereby thoſe parts of the generation are affected [d]) or it were by reaſon of old age [e]. For howſoever it may ſeem a paradox to ſome, yet it is commonly received for a true concluſion amongſt the Learned, that as a Woman in proceſs of time becometh barren, namely, after fifty years: So a Man alſo is at the length deprived of the ability of begetting a Child [f], that is to ſay, at fourſcore years, if not before [g]; neither is that contrary, where I ſaid before, That by the Laws of this Realm, if a Man take to Wife a ſingle Woman great with Child by another Man, then he which married her, ſhall be the Father of the Child, albeit ſhe were delivered the next day after the Marriage ſolemnized: For there it is poſſible for the Husband to have begotten the Child; here impoſſible [h]. Now the Law doth often preſuppoſe or allow that for true, which is falſe, becauſe it may be true [i]; but the Law doth never preſuppoſe or feign that thing to be, which is impoſſible ſo to be, for that were unreaſonable, and againſt nature which directeth art.

Again [k], in that caſe he is worthily the Father of anothers Baſtard, becauſe he when he is free, yet willingly taketh her with all faults, whom he knoweth to be anothers Whore: But here an honeſt Man is greatly beguiled by her to whom he is already tied, and therefore leſs worthy to be further afflicted [l]. But is it not manifeſt, that many have ſucceeded in the Inheritance, as lawful and natural Children of thoſe perſons, who neither were principal, neither acceſſary, nor any way privy to the begetting either of a leg or an arm, no not ſo much as

[x] L. filium. ff. de his qui ſunt ſui, vel al. jur. & DD. ibidem. Gabr. lib. 1. com. concluſ. tit. de præſump. concl. 14. n. 19. Pract. Andr. Gail. lib. 2. obſerv. 37. n. 15.

[y] Quamvis quoad alios effectus alii aliter ſentiunt, qua de re vide D. Coke, lib. 5. In Buries Caſe.

[z] L. 1. ff. de Inſtit. & jur.

[a] § minorem Inſtit. de adop. Pariſ. conſil. 10. vol. 2.

[b] Pariſ. de conſil. 20. & conſil. 29. vol. 2. Bor. in L. ſi is qui ff. de uſu cap. num. 22.

[c] L. filium ff. de his qui ſunt ſui vel alien. jur. Maſcard. de probat. concluſ. 788. n. 40, 41, 42. Abb. & Felin. in c. per tuas de probat. extr. Eraſon. de leg. & conſuetud. Angl. lib. 2. c. 29. n. 5. & lib. 1. c. 9. in fin.

[d] Menoch. de Arb. jud. quæſt. caſ. 89. n. 53. Pariſ. d. conſil. 29. n. 80. [e] Maſcard. de probat. concluſ. 788. n. 43, 44. Palæot. d Noth. & Spur. c. 24. n. 3. & ante eos ſcripſerunt Bald. & Cyn. in d. L. filium. [f] De hac re, ut de re qualibet præclare Tiraquel. de leg. connub. Lege 5. ſub finem verb. Nec erit intempeſtivum. [g] Socin. conſil. 65. vol. 3. Pariſ. conſil. 29. vol. 2. Menoch. d. caſ. 89. n. 57. Attamen in hoc regno Angliæ vulgò creditur, ſenes etiam plus quàm octogenarios, hac poteſtate non eſſe penitus orbatos, eorumque liberi communiter reputantur legitimi, & proinde ſuccedunt iis ac reliqui, hoc impedimento non obſtante. [h] D. L. filium, quo etiam tendit quod Bractonus Juriſconſultus Anglus, non minùs peritus, quam antiquus ſcriptum reliquit. Legitimus (inquit) & hæres judicabitur, naſcitur ab uxore, dum tamen præſumi poſſit, quòd maritus potuit ipſum genuiſſe. [i] Bar. Angl. & alii in L. ſi is qui pro emptore, ff. de uſu. cap. Menoch. de præſump. lib. 1. q. 8. [k] Bar. in d. L. ſi is qui, n. 22. Alciat. de præſump. in prin. [l] Affligtio afflicto non eſt infligenda. Bar. in L. 2. ff. de nop. op. nun. Bald. in L. precibus, C. de impub. & al. ſub.

of the little finger of that Issue? Indeed no marvel, when there is not due proof of impossibility [m], the defect is not in Law, but in proof [n], which proof is said to be the Chariot, wherein the Judge doth ride towards his Sentence [o]; or howsoever, such Issue is admitted to the Succession by interpretation of the Laws of this Realm [p]: Yet when the Testator speaketh of Issue, it is not likely that he did mean of such Issue, which is not as well natural as lawful [q]; which meaning of the Testator, as in other Cases, so in this also ought to be observed [r].

Divers other Limitations [s] there be of this former Rule, shewing, that the Child is not to be ascribed to the Husband, but to the Adulterer; namely, when the Wife doth make an elopement from her Husband [t], and doth altogether cohabit with the Adulterer, and especially if then also the Child be born blind, or lame, or be like unto the Adulterer; for then it doth seem, that the Adulterer shall be judged to be the Childs Father, unless it be proved that the Husband had free and often access unto the Mother; but because, I doubt of the truth of these Limitations, I dare not deliver them for currant. Nevertheless in Testaments, the Will and meaning of the Testator is to be regarded, and so the Husband is to be judged to have had Issue, or not to have had Issue accordingly [u]. What if the Wife be married to another Husband very shortly after the death of her former Husband, and after her second Marriage be delivered of a Child, whose Issue shall this be, the former or the second Husbands? If the Wife were great, or apparantly with Child at the death of her former Husband, then there is no question, but that the Issue is to be ascribed to the former Husband [x]. But if she were not apparently with Child, so that by possibility of nature, it might be the Child, either of the former or the second Husband, for that perhaps she is delivered within eight or nine Moneths after the death of her former Husband; yet not before the seventh Moneth next after her second Marriage, then the Question is much more doubtful [y]: Wherein how many heads, so many wits; how many men, so many minds; and no Man which hath not somewhat to say, as well for the defence of his own opinion, as for the confutation of the contrary. But I will not trouble you with their tedious disputations [z], I will briefly repeat their opinions touching this Question.

Some therefore do hold, that the former Husband ought to be adjudged the Father [a]; some that the second Husband [b]; others that both

[m] Nam cùm par militet in utroque casu ratio, cur non idem jus? Cur quæso magis favendum est absenti, ne habeatur pro patre illius quem genuit alter, quam qui morbo, vel senio confectus generare nequeat? Quod si dixeris difficiliùs probari impotentiam, quàm absentiam: Attamen probatâ hac impotentiâ, eadem tunc prorsus manet hinc, ac indè ratio.

[n] L. duo sunt Titii, ff. de testa. tutel.

[o] Mantic. de conject. ult. vol. lib. 4. tit. 11. n. 43.

[p] Immo non admittitur probata gignendi impotentia, si Bractono fidem adhibeamus, lib. 2. c. 29. n. 4. in fin. ubi non aliter ab alio genitum, pro mariti filio judicandum fore censet, quam si præsumi possit, eum à marito gigni potuisse.

[q] Mantic. de conject. ult. vol. lib. 11. tit. 8. n. 2. per L. uit. de his qui ætatis.

[r] L. in conditionibus ff. de cond. & demon. L. cùm quæstio. C. de lega, § disponat. in Auth. de nup. Dec. cons. 399.

[s] Quas videre est apud Gabr. l. 1. com. concluf. 14. Mascard. de probat. concluf. 788. [t] Brook tit. Bastardy. n. 4. Alciat. de præsump. reg. 3. præsump. 37. num. 11. Paris. consil. 10. num. 34. vol. 2. Mascard. de probat. concluf. 788. n. 11. [u] Mantic. ubi supra. Paul. de Castr. consil. 30. vol. 1. [x] DD. in L. Gallus, ff. de lib. & posthu. Terms of Law, verb. Bastardy. Kitchin, in tit. descent. fol. 108. [y] De qua Bar. Bald. Alex. Jas. & alii in L. Gallus, ff. de lib. & posthu. Alciat. de præsump. reg. 3. præsump. 37. in fin. [z] Si quis horum altercationes & pugnas videre cupiat, legat. Jas. in d. L. Gallus, & Jacob. de Beluis. in quadam disputatione quam habet in L. 1. de bon. poss. secundum Tabul. [a] Multos in hac sententia stetisse refert. Coras. in annotat. ad Arrestum quoddam Tholos. fol. 33. [b] Anto. Vecca. in L. 7. ff. de stat. hom. post. Imol. in d. L. Gallus.

both [c]; and others again, that neither [d] is to be deemed the Father of the Iſſue. Some ſay that the Mother is to be credited [e], which of them is the Father; and ſome ſay, that it is in the Child, to elect and chuſe [f], whether of them he will for his Father: Others are of this mind, that he ſhall be deemed the Father, by whom the Child may receive the greater benefit [g]; and others, that he ſhall be the Father, unto whom the Child is more like in favor, complexion, and proportion of Body [h]. Many do leave it to the diſcretion of the circumſpect Judge, who is not tied to any one opinion alone, but according to the variety and probability of circumſtances (together with the advice of Phyſicians, Midwives, and eſpecially ſuch as be skilful in Aſtrology [i]) is to decide the controverſie [k]. Finally, by the Laws of this Realm, at leaſt, in Caſes of Succeſſion of Land, it ſeemeth, That the ſecond Husband ſhall be the Father of this Child [l], becauſe it being certain, that the Child is born during the marrying and cohabitation betwixt ſecond Husband and the Mother, and uncertain whether he were begotten before, it were very hard and dangerous to adjudge him to be another Mans Child, rather than the ſecond Husbands, who by poſſibility of nature, may be his Father [m], and to whom it is to be imputed, that he adventured ſo ſoon upon another Mans Widow [n].

When the Iſſue is *both natural and lawful, but* (12) *dieth before the Father*: In this Caſe the Father is ſaid to die without Iſſue [o]; and therefore, he that is made Executor, or to whom any thing is bequeathed upon Condition, if the Teſtator die without Iſſue, may in this Caſe be admitted to the Executorſhip, or obtain the Legacy [p]: For albeit the Teſtator may be ſaid to have had Iſſue, yet can it not be denied, but that he died without Iſſue, becauſe at the time of his death he had no Iſſue [q]. Indeed, (13) if the Teſtator make thee his Executor, or bequeath unto thee a hundred pound upon Condition, if he ſhall have no Iſſue: Then if the Teſtator after the making of the Will had Iſſue, although the ſame were not extant, nor living at the time of the Teſtators death, it is ſufficient to exclude thee from the Executorſhip and Legacy [r], unleſs it do appear that the Teſtator did mean of having Children at the time of the death [s]. Which meaning is ſaid to appear ſometimes by this word (*then* [t]) as when Teſtator ſaith, *If I have no Iſſue, then I will that* A. B. *be my Executor*; for this word (*then*) is ſaid to ſignifie extremity of time, ſo that it it is not ſufficient that the Teſtator had Iſſue in the mean time [u], unleſs even then he had Iſſue when his Teſtament ſhould take effect, which it cannot do ſo long as the Teſtator liveth [x].

When (14) the Child is in *the Mothers Womb, at ſuch time as the Teſtator dieth.* If we would in this Caſe know, whether that Man is

[c] Angel. in L. duo. de hæred. Inſtituend. ff.
[d] Jac. de Beluiſ. in d. diſputat.
[e] Alciat. d. præſumpt. 37. n. 15. per L. etiam ff. de probat.
[f] Alex. in d. L. Gallus, n. 14. verſ. hoc tamen dictum, & cum eo conſentit Berry Juſtificiarius Angliæ, de quo Brook tit. Baſtardy, n. 18. in fin.
[g] Dec. in c. per tuas, de probat. extra. n. 2. verſ. 4.
[h] Coraſ. lib. 2. Miſcel. c. 22.
[i] Apoſtil. ad Alex. in d. L. Gallus, ubi Aſtrologi longè præponuntur medicis.
[k] Bar. in d. L. Gallus, cujus opinio & verior & crebrior, & tutior eſſe dicitur, attento jure civili. Jaſ. in d. L. Gallus, n. 52 & Alex. in fin.
[l] Tract. de Republic. Angl. l. 3. c. 6. Terms of Law, verb. Baſtardy, Kitchin. tit. Diſcent. fol. 108.
[m] Apoſtil. ad Bar. in d. L. Gallus.
[n] Anto. Vac. in L. 7. de ſtat. hom. ff.
[o] L. ex facto, § ſi quis autem, ff. ad Trebel. Bar. in L. hæred. eodem tit. Zaſ. in L. in ſubſtitutione de vulg. & pupil. ſub. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 3.
[p] D. § ſi quis autem.
[q] Bar. in d. L. hæredibus, Zaſ. in d. L. in ſubſtitutione Mantic. in d. tit. 6. Graſſ. Theſaur. com. op. § fidei commiſſ. q. 35.
[r] Jac. de Are. Alberic. de Roſa. in d. L. ex facto, § pen. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 5.
[s] Mantic. ubi ſupra, Zaſ. in d. L. in ſubſtitutione, n. 15.
[t] L. ſi his, § ſi ita, de cond. & demon. ff. Zaſ. in d. L. in ſubſtitutione, n. 15. fol. 30.
[u] D. § ſi ita.
[x] Mantic. poſt Bar. & Alex. d. lib. 11. de conject. ult. vol. tit. 6. n. 5.

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to be judged to have died without Issue, we must consider, whether it be for the benefit of the Child, that the Father should be accounted to have died without Issue, or not: For howsoever the Rule be, that he is not said to die without Issue, whose Wife is with Child at his death [y]; yet that Rule ought to take place when it tendeth to the benefit of the Child [z], not when it tendeth to the prejudice of the Child, or only benefit of another [a]. Wherefore, if the Testator make thee his Executor, or give thee an hundred pound, if he die without Issue, after which Will made, he dieth, leaving his Wife with Child. In this Case he is reputed to die without Issue; and so thou art to be admitted to the Executorship, and mayest recover thy Legacy [b], unless it be more beneficial to the Child, that his Father should have been reputed to have died without Issue; for then thou art excluded [c].

When (15) the Child *dieth so soon as it is born*, we must consider, whether it were born in due time, or no, if it were born in due time, so that by possibility of nature it might have lived longer (as in the Seventh, Ninth, or Tenth Moneth [d]) the Father is judged to have Issue, especially (16) if the Child were once heard to cry [e]: For then also by the Laws of this Realm, that Man whose Wife was seised in Fee-simple, or in Fee-tail general, or as Heir in Fee-tail special, shall be said to have had Issue; and by reason thereof, after the decease of his Wife, shall hold the same Land during his life; and shall be called *Tenant by the courtesie of England*, for that it is thought that the same Law is not used in any other Countrey, saving only in *England* [f]. But (17) if the Child which he had by his Wife were not heard to cry, it is thought that he cannot be Tenant by the courtesie [g]. Which opinion, though ancient, hath been strongly incountered of late, and shrewdly shaken by Men of deep judgment, and reverend authority [h]; and so the same not being free from contradiction, cannot be utterly void of doubt [i]; and therefore, (as it becometh me) I do very willingly refer the determination thereof, to the learned and expert in the study and practice of the Laws Temporal of this Land. Nevertheless, to other purposes and Testamentary effects, determinable in the Ecclesiastical Courts, I suppose he shall not be reputed to have died without Issue, although his Child did never cry, so that it did sensibly breathe or move [k], for what if the Child were born dumb [l]. Therefore I say, by the Civil and Ecclesiastical Laws concerning Testamentary effects, the Father shall not be accounted to have died without Issue, if the Child did but breathe, and though it did not, nor could not cry, but died in the hands of the Midwife [m]; for crying is not an only proof of life [n], since it may be proved by other means, as by motion, breathing, and such like [o]. Indeed (18) if the Child be born dead [p], or being

[y] L. si quis prægnantem de reg. jur. ff. L. jubemus, § si quis autem, C. ad Trebel.
[z] L. qui in utero, ff. de stat. hom.
[a] D. L. qui in utero, Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 9.
[b] Mantic. d. tit. 6. n. 9. posth. Bald. in d. L. qui in utero. col. 2.
[c] L. jubemus § pen. C. ad Trebel. & ibi Paul. de Castr.
[d] L. septimo mense. de stat. hom. L. Gallus in prin. de lib. & posthu. L. in estat. § ult. de suis & legit. ff.
[e] Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 10. Mascard. Tract. de probat. verb. Natus, concl. 1088. n. 9, 10. per L. quod certatum C. de posthu. hæred. instituend. & Sichard. in d. L. n. 4.
[f] Littleton, tit. Curtesie d'Angleterre.
[g] Bract. de leg. & consuet. Angl. lib. 5. tit. de except. c. 30. n. 7, 8.
[h] Dyer, fol. 25. n. 159. post Fitzh. tit. 8. fol. 34. Pains Case, Instit. part. 1. fol. 29 b.
[i] Partum immaturum nasci, quibus signis probetur. Vide Menoch. de præsump. lib. 6. præsu. 52.
[k] L. quod dicitur ff. de lib. & posthu. L. 2, 3. & C. de posthu. Felin. in c. sicut de homicid. extra. Mascard. Tract. de probat. verb. Natus, conclus. 1088. sub fin.
[l] D. L. quod dicitur & d. L. 2, 3. & DD. ibid.
[m] D. L. 3. C. de posthu.
[n] L. quod certatum C. de posthu. & ibi Sichard. n. 4. Mascard. de probat. conclus. 1088. n. 10.
[o] L. si Magister. C. de Instit. & sub. Mascard. d. conclus. 1088. sub finem. Sichard. in d. L. quod certatum.
[p] L. qui mortui, ff. de verb. signif.

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half born alive, yet dieth before it be wholly born [q], he ſhall not be reputed to have Iſſue [r]. Likewiſe in the other Caſe, that is to ſay, when the Child is not brought forth in due time, (as perhaps before the Seventh Moneth, or in the Eighth Moneth [s]) ſo that it is impoſſible for the ſame to live: The Parents for and concerning Teſtamentary effects, ſhall not be accounted thereby to have had Iſſue, howſoever the Child, for a while after the birth, did ſenſibly breathe and move [t].

If (19) the Teſtator make thee his Executor, or do bequeath unto thee any Legacy conditionally, if he ſhall have no iſſue, and afterwards his Wife do bring forth a Monſter, or miſ-ſhapen Creature, having peradventure a head like unto a Dogs-head, or to the head of an Aſs, or of a Raven, or Duck, or of ſome other Beaſt or Bird: Such Monſtrous Creature, though it ſhould live (as commonly none do) yet it is not accounted amongſt the Teſtators Children [u]: For the Law doth not preſume that Creature to have the Soul of a Man, which hath a form and ſhape ſo ſtrange and different from the ſhape of a Man [x]. For by the Law of this Realm, if the Wife be delivered of a Monſter, which hath not the ſhape of mankind; this is no Iſſue in Law. But although the Iſſue hath ſome deformity in any part of his Body; yet if he hath humane ſhape, this ſufficeth. (*Bract. tit.* 5. *f.* 437, 438. *Brit. cap.* 66. *fol.* 83. *Fleta, lib.* 1. *cap.* 5. *Lib.* 6. *cap.* 54. *Inſtit. part.* 1. *fol.* 29 *b.*) as having ſix fingers on either hand [y]; or on the contrary, wanting ſome of the ordinary Members, as having but one hand, or one foot [z]: Such Creature is not excluded, but is to be accounted for the Teſtators Child. What if there be Duplication of notable Members, as to have four arms, or two heads, or diſorder in the principal Members, as the face ſtanding backwards, or in the breſt? In this Caſe I ſuppoſe much to be attributed to the diſcretion of the Judge [a]. And albeit the Writers ſeem rather to incline to this opinion, that they be Monſters, and ſo not to be accounted as Children [b]; notwithſtanding, if any Legacy be left, not by the Parents to another, but to the Parents by another upon Condition, if they ſhall have Iſſue: In this Caſe it ſeemeth that it doth not hinder the Parents, though the Father did beget, and the Mother bring forth a Monſter, when it cannot be imputed to their fault, wherefore the Iſſue was Monſtrous [c].

If (20) the Teſtator make the Child in the Mothers Womb his Executor, and the Mother bring forth two or three Children at that birth, whether are they all to be admitted Executors? Likewiſe (21) the Teſtator bequeathing to the Child in the Mothers Womb, if it be a Man Child a greater ſum, if a Woman Child, then a leſſer ſum: The Mother bringing forth a Son and a Daughter at one Burthen; how much is to either? Theſe Queſtions are elſwhere abſolved [d].

[c] D. L. quaret. de verb. ſignif. & Alciat. ac Rebuff. ibidem. [d] Infra eadem part. § 10. ſub finem.

[q] Alciat. in d. L. qui mortuus. Cui adde Tiraquel. in Rep. L. ſi unquam, C. de revoc. donac. verb. ſuſceperit. n. 132. ubi etiam diſputat an talis Baptizari poſſit, cujus tantum caput in partu appareat.

[r] D. L. 3. in fin. d. L. qui mortui, & DD. in LL.

[s] De Nato in 8. menſe, Vide Joſeph. Ludovic. concluſ. 37. & Gentil. De naſcendi tempore, fol. 11. n. 13.

[t] L. 2. C. de poſthu. Sccin. ſen. conſil. 275. n. 20. vol. 2. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 10. Graſſ. Theſaur. com. op. § fidei. commiſſ. q. 33. in fin.

[u] L. non ſunt. ff. de ſtat. hom. Olden. in eand. L. & Sichard. in d. L. 3. C. de poſthu.

[x] Bald. in d. L. non ſunt. Sichard. in d. L. 3. n. 5.

[y] DD. in d. L. 3. C. de poſthu. & in d. L. non ſunt & in L. oſtentum, & in L. quærer. ff. de verb. ſig. Idem quoque juris eſt, ſi quis habeat tres teſtes, Alciat. in d. L. quæret. n. 9.

[z] Bald. & Aug. in L. quod dicitur, ff. de lib. & poſthu.

[a] Sichard. in d. L. 3. C. de poſthu. n. 5. verb. cum autem.

[b] L. oſtentum. ff. de verb. ſignif. DD. in d. L. quod dicitur.

Sect. XVI. What order is to be taken concerning the Administration of the Goods of the deceased, whiles the Condition of the Executorship dependeth unaccomplished.

1. *Of the Remedy which Creditors and Legataries have, during the suspence of the Condition of the Executorship.*
2. *The first Remedy, is to commit the Administration to him that is conditionally assigned Executor.*
3. *The Effect of this Administration.*
4. *What if the Executor will not meddle with the Administration or Possession of the Goods in the mean time.*

FOr as much (1) as the Nature of every honest and possible Condition is such, as it doth suspend the Execution and Effect of the Dispositon [a]; so that, in the mean time, the party deceased, cannot be judged to have died either Testate or Intestate; and consequently he that is made Executor, is neither to be received nor repelled, in the mean time, to or from the Executorship [b]. It shall not be amiss to shew what order is to be taken, for, and concerning the Possession and Administration of the Goods of the deceased, and what Remedy the Creditors and Legataries have, for the obtaining of their Debts and Legacies, which are due presently after the death of the Testator, whiles the Condition of the Executorship dependeth [c]: For it seemeth, not only inconvenient but unjust also, that they, especially the Creditors [d] should be remedileſs all that while, during the suspence or expectation of the performance of the Condition, until that be performed by the Executor, which perhaps would not, nor could not be effected in seven years.

The first (2) Remedy therefore is this, considering that he which maketh an Executor conditionally, cannot be judged to have died Intestate, the Condition depending, or so long as the Testament may take effect [e], and so the Administration of the Goods cannot be committed according to the Statutes of this Realm, which provide only in that Case, where a Man dieth Intestate, or where the Executor doth refuse to prove the Testament [f]. It is provided by the Civil and Ecclesiastical Laws, that it shall be lawful for the Ordinary to commit the Administration and Possession of the Goods of the deceased, to him that is made Executor, only for and during so long time as the Condition dependeth, and is not extant, or else deficient [g]. By (3) vertue of which Administration or Decree of Possession, the said Executor may enter to the said Goods, and may Administer and Sell

[a] L. qui hæredi. de cond. & demon. L. si quis sub conditione. Si quis omissa causa testa. L. cedere diem. de verb. sig. ff. Grass. Thesaur. com. op. § legatum, q. 52. & supra eadem part. § 6.

[b] L. quamdiu. ff. de acquir. hæred. Minsin. in § hæres. Instit. de hæred. Instituend.

[c] Quod autem jure civili non possunt legata peti pendente conditione institutionis, ut in qua tota vis testamenti collocata sit, non observatur in Anglia, prout aliàs plenius diximus, infra part. 6.

[d] Creditores enim de damno vitando: Legatarii autem de lucro captando certare dignoscuntur. L. sciunus, § & si præfatum, C. de jure delib.

[e] D. L. quàm divi. ff. de acquir. hæred. § 1, 2. ff. de hæred. instituend.

[f] Stat. H. 8. an. 21. c. 5. & stat. Ed. 3. an. 31. c. 11.

[g] L. si quis instituatur,

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the ſame for the ſatisfying of the Debts, due by the Teſtator, and payment of his Legacies ſimply bequeathed, and may be convented by them, if he make delays during the time aforeſaid [h]: And if afterwards the Condition be performed or extant, then may he ſtill retain the Goods of the deceaſed, as Executor to the Will [i]: But if the Condition be infringed, or deficient, then ought he to make reſtitution to the next of kin to the deceaſed, or to thoſe that ſhall have Adminiſtration of his Goods [k]: For by breach or defect of the Condition, the deceaſed is reputed to have died Inteſtate, or as he had never made Executor [l], and the former Adminiſtration is finiſhed, and a new may be committed [m].

If he (4) that is made Executor conditionally, will not meddle with the Adminiſtration of the Goods of the deceaſed, nor yet perform the Condition, the next Remedy is this; you muſt conſider of the nature of the Condition, that is to ſay, whether the performance of the ſame do conſiſt in the power of the Executor, or not [n]. If it be ſuch a Condition as he may eaſily perform, then may the Ordinary aſſign unto him a competent term, for the accompliſhment thereof [o], within which time, if the Executor do not perform the ſame, it is reputed for infringed or deficient [p]; and ſo the Adminiſtration may be committed according to the Statute; in this Caſe, as of one dying Inteſtate [q]: And the Executor ſhall be excluded, if he do not purge his delay, before the Adminiſtrators do meddle with the Goods [r]. But if the Ordinary knowing of this Will, ſhall commit Adminiſtration to ſome other without the Executors knowledge; or without appointing to him a competent time for the accompliſhment of the Condition mentioned in the Will, upon the which he is made Executor; which Condition he was willing to have performed at the firſt, and afterwards doth perform the ſame, and then proveth the Will. In this Caſe the Committee of the Ordinary, that is to ſay, the Adminiſtrator is in danger to be ſued by the Executor in an Action of Treſpaſs [s], unleſs the Executor did refuſe before [t]; or, unleſs the Teſtament were ſo ſecretly kept, that the Ordinary was ignorant thereof; which ignorance is rather to be intended in the Ordinary, not only becauſe it is a Matter in Fact [u], but alſo of another Mans, the knowledge whereof is not preſumed [x]. Moreover, it ſeemeth that where there is a Teſtament, there the Action againſt the Adminiſtrator ſhall be abated, where there be Executors able and willing to undergo the Executorſhip, albeit as yet they have not proved the Teſtament [y]. If the Condition conſiſt not in the power of the Executor, then may the Ordinary at the Petition of the Creditors, appoint a time to the Executor to undertake the Adminiſtration and Poſſeſſion of the Goods; during which time, if he refuſe or neglect to undertake the ſame Adminiſtration; then may the Ordinary commit the ſame to ſuch as have Intereſt, until ſuch time as the Condition be either extant or deficient [z].

[h] D. L. ſi quis. Quæ lex etſi creditoribus tantum præbeat remedium, tamen jure quo utimur, legatariis quoque ſuccurritur, utpote quibus legata omnino debeantur, etiamſi deficiat inſtitutionis conditio, nec aliquis exiſtat hæres, ſeu executor (infra part. 7. § 19.) nedum ubi pendeat adhuc conditio.

[i] Dum tamen probatum ſit teſtamentum, & ab Ordinario approbatum.

[k] L. 2. § ſi ſub conditione ff. de bon. poſſeſſ. ſecundum Tabul. Graſſ. Theſaur. com. op. § bon. poſſeſſ. q. 5. n. 7.

[l] L. hæres. de acquir. hæred. L. quod dicitur de mil. teſta. ff.

[m] D. L. ſi quis inſtituatur. ff. de hæred. inſtit.

[n] D. L. ſi quis. § 1, 2.

[o] Forraſſe 100. dies extraneis, & annum defuncti liberis, ſecundum Bar. & Bald. in d. § 1.

[p] Bar. & Paul. de Caſtr. in d. § 1.

[q] Stat. H. 8. an. 21. c. 5.

[r] Bald. & alii in d. § 1.

[s] Abridgement dez Caſes edit. An. Dom. 1599. tit. Adminiſtration, fol. 183. n. 1.

[t] Ibidem.

[u] Præſumendum eſſe, quempiam ab inteſtato deceſſiſſe, quàm condito Teſtamento communis & uſu recepta eſt opinio (maxime quia factum non præſumitur,) pulchrè Docet Franciſ. Mantic. de conject. ult. vol. lib. 2. tit. 1. n. 3, 4. [x] L. Verius ff. de probat. [y] L. Abridgment dez Caſes, ubi 5. fol. 135. n. 3. [z] D. § 1. & DD. ibidem.

Either elſe the Ordinary may take a Letter *Ad colligendum bona defuncti*, to ſome other perſon then the Executor. But here the Ordinary had need to take good heed: For this is a dangerous courſe to himſelf, becauſe that perſon which hath a Letter *ad colligendum*, not being Adminiſtrator, the Actions which otherwiſe might be brought againſt the Adminiſtrator, do now lie againſt the Ordinary, as well as if he took the Goods into his own hands, or by the hands of any of his Servants by his appointment or commandment [a]. But what if he which hath Letters *ad colligendum*, hath alſo authority from the Ordinary to ſell ſuch Goods of the deceaſed, as otherwiſe would periſh, *& quæ ſervando ſervari non poſſunt*; and thereupon, doth ſell ſuch as could not be preſerved: Whether is he ſubject to be ſued by the Creditors of the deceaſed, as Executor of his own wrong, yea, or nay? In this Caſe, I take the Law to be that he cannot plead that he did never adminiſter as Executor, or what he did, was by vertue of the Letter *Ad colligendum & ad vendendum bona peritura, &c.* For it is holden, that albeit the Ordinary may grant authority *ad colligendum*, as before; yet he cannot grant authority *Ad vendendum bona defuncti, etiam peritura* [b]. And ſo the authority not being good in Law, he may be ſued as Executor of his own wrong, howſoever thoſe Goods by him ſold, would otherwiſe have periſhed [c].

a Terms of Law, verb. Adminiſtrator Brooks Abridgment. tit. Ordinarii, n. 13. Abridg. dez Caſes, tit. Executor. fol. 176. n. 11.

b Dyer, fol. 256. Cuâ adde Abridgement dez Caſes, tit. Executors, fol. 176. n. 12.

c Et ita poſt maturam deliberationem fuit Judicatum, Teſt. D. Dyer ubi ſupra.

Sect. XVII. Of the making of an Executor, to, or from a certain time.

1. *An Executor may be ordained, either for a time, or from a time.*
2. *The Ordinary may commit Adminiſtration until there be an Executor, or after the Executorſhip is ended.*
3. *Whether a Man may die partly Teſtate, and partly Inteſtate.*
4. *Whether he is ſaid to die partly Teſtate, and partly Inteſtate, which appointeth an Executor, to, or from an uncertain time.*
5. *A Legacy may be given to, or from a certain time, or to, or from an uncertain time.*
6. *That Legacy is not tranſmiſſible, which is given from an uncertain time.*
7. *What if the uncertainty be not about the Queſtion* whether, *but about the Queſtion* when?
8. *What if the uncertainty be not joyned to Subſtance of the Legacy, but to the Execution.*
9. *The Legacy is not tranſmiſſible, when the Queſtion is only* when, *not* whether.
10. *The Teſtator may make that tranſmiſſible, which otherwiſe is not tranſmiſſible.*
11. *Whether that Legacy be tranſmiſſible, which is given after a certain age.*

12. *Dif-*

12. *Difference whether the Legacy be joyned to the Subſtance, or to the Execution of the Diſpoſition.*
13. *Certain Caſes wherein a Legacy is tranſmiſſible, albeit the age be joyned to the Subſtance of the Legacy.*

ALbeit (1) by the Civil Law, *Hæres* the Heir cannot be inſtituted, cannot be inſtituted, either from a certain time, or until a certain time [a], leſt the deceaſed might ſeem to die, partly Teſtate, and partly Inteſtate [b]; yet where an Executor is ordained, howſoever the Executor be *quaſi Hæres*; at leaſt by the Laws of this Realm, he may be appointed either from a certain time, or until a certain time [d]. For example, the Teſtator maketh thee his Executor after the expiration of five years next after his death, or he doth make thee his Executor, for, and during five years next after his death: This Aſſignation is lawful by the Laws of this Realm [e]. And the (2) Ordinary may commit the Adminiſtration of the Goods of the deceaſed to the next of kin in the mean time, during which time, the Act of the Adminiſtrator is Good, and cannot be avoided by the Executor afterwards [f]; for in the mean time he dieth Inteſtate. And likewiſe, he may commit the Adminiſtration of the Goods of the deceaſed unadminiſtred by thee, after the expiration of the time of thy Executorſhip, where thou art appointed Executor but for a time. For after the term be expired, he is ſaid to be Inteſtate [g].

Where (3) it is ſaid, that a Man cannot die partly Teſtate, and partly Inteſtate, that is true where the ſtrictneſs of the Civil Law is obſerved [h]: But where the Teſtator is not tied to ſuch ſtrict obſervance, whether it be by Reaſon of Legal Priviledge, as in *Military Teſtaments* [i], and in Teſtaments *Ad pias cauſas* [k], or whether it be by cuſtom of the place, where the Teſtator abideth [l], as in *England*, where we injoy all immunity, nor be tied to any other obſervance in making of Teſtaments; than that which is *Juris gentium* [m]; in theſe Caſes and Places, a Man may die partly Teſtate, and partly Inteſtate [n].

If the (4) Teſtator do ordain, or make an Executor, from or until an uncertain time, as from or until the death or marriage of his Son: This Aſſignation is good and ſufficient, even by the Civil Law [o]; neither is the Teſtator in this Caſe ſaid to die partly Teſtate, and partly Inteſtate [p]: For an uncertain time is compared to a Condition [q], which if it come to paſs, and be extant, the Teſtator is reputed to have died wholly Teſtate [r]: For a Condition purified had reference backward, and is underſtood as if it had been accompliſhed immediately upon the

a L hæreditas ff. de hæred. inſtituend. § hæres inſtit. eo .em, tit.
b L. Jus noſtrum de reg. jur. ff. cujus regulæ rationem aſſignat Porcius in § & unum Inſtit de hæred. inſtituend.
c Supra 1. parr. § 3. n. 19. Haddon. de refor. leg. Eccleſiaſt. Angliæ Doct. & Stud. lib. 2. cap. 11. Tract. de Repub. Ang. lib. 1. c. 9.
d Brook. Abridg. tit exec. n. 155. tit. admin. n. 45. Plowd. in caſ. inter Greisbr. & Fox.
e Brook. ubi ſupra.
f Plowd. in caſu inter Greisbr. & Fox.
g Brook. Abridg. tit. adminiſtr. n. 1. & n. 45.
h Dec. Cagnol. & Hiero. Franc. in d. L. jus noſtrum de reg. jur. ff.
i L. miles, ff de mil. teſton. Cagnol. &. Dec. in d. L. jus noſtrum.
k Bar. in L. 1. C. de ſacroſan. Eccleſiaſt. Hiero. Franc. in d. L. jus noſtrum in fin.
l Hiero. Franc. in d. L. jus noſtrum.
m Supra 1. parr. § 10. in prin. tract. de Repub. Angl. lib. 3. cap. 7. *n* Brook. & Plowd. ubi ſupra adde Socin. Tract. reg. & ſal. reg. 400. ubi tradidit 20 caſus, in quibus poteſt quis decedere pro parte teſtatus, pro parte inteſtatus. *o* L. in tempus ff. de hæred. inſtit. L. extraneum eod. tit. C. gloſſ. in § hæres, Inſtit. de hæred. inſtituend. Graſſ. Theſaur. com. op. §. Inſtit. q. 24. n. 4. *p* Hiero. Franc. in d. L. jus noſtrum. *q* L dies incertus ff. de cond. & demon. Jaſ. in L. ſi cui legetur de leg. 1. n. 6. Cujac. obſervar. l. b. 18. c. 1. *r* L. hæres quandocunque de acquir. hæred. Hiero. Franc. in d. L. jus noſtrum de reg. jur. ff.

death of the Testator [f]; neither can the Testator be said to die Intestate, in the mean time before the event, or whiles the Condition dependeth in expectation [t]. Yet in a Legacy, the Condition purified hath not relation backward, to the death of the Testator, as though it had been then accomplished but only to the time of the existence or performance of the Condition [u]. And therefore the Fruits and Profits which arise out of the Legacy in the mean time, are not due to the Legatary [x]; especially when as the Condition is arbitrary, or such as is in the power of the Legatary to perform the same at his pleasure [y]. But if the Condition be infringed, or become deficient, then is the Testator to be adjudged, to have died always intestate, and not from the time of the breach, or defect of the Condition [z]; which is the cause wherefore in Conditional Assignations, the Administration cannot be committed to the next of kin: As in case of one dying Intestate, so long as the Condition is in suspence; as hath been before declared.

And here (5) note, That as an Executor may be appointed from a certain time, or until a certain time: So a Legacy may be bequeathed either from a certain time, or until a certain time [a]. And albeit, where (6) a Legacy is given from, or after a certain time, the Legatary dying in the mean while, before the time be come, the Executors or Administrators of that Legatary, may demand and recover the Legacy, after the day is past, as might the Legatary himself if he had lived [b]; unless the meaning of the Testator be contrary [c], or unless it be such a thing as cannot be transmitted to the Executor, as personal service [d]. Yet (7) if the Legacy be given after an uncertain time (for so also it is lawful for the Testator to do [e]) the Legatary dying in the mean while, the Executors or Administrators of the Legatary deceased, cannot demand the same, but are utterly excluded [f]; and that (8) not only when it is uncertain *whether* it shall happen [g], but also when it is uncertain *when* it shall happen [h]. For example, the Testator giveth thee an hundred pound when his Daughter shall be married. This is uncertain whether [i] it shall happen at all, or no; or the Testator giveth thee an hundred pound when his son shall die. This is uncertain when [k] it shall happen, not whether it shall happen; for it is certain we must all die. In both which cases, if thou die before the day be come, that is to say, before the Marriage of the Testators Daughter, or death of his Son, the Legacy is utterly extinguished, or as if it had been Conditional [l]. Neither (9) is it material whether the uncertainty be joyned to the *Substance* of the Deposition, or to the *Execution* thereof: For in both cases the Legacy or Deposition is reputed Conditional [m];

L. quod dicitur. de mil. testom. L. hæres, quandocunque de acquir. hæred. ff. Minsing. in § hæres, Instit. de hæred. instituend. Tiraquel. de retract. §. 1. glos. 2. 27.

t Minsing. in d. §. hæres, n. 4. 14.

u Bar. Jas. & alii in L. si filius fam. de verb. oblig. ff. L. quæ legata ff. de reg. jur. & ibid. Dec. & Hiero. Franc.

x Vide Bald. in L. fin. § sed quia. C. com. de Lege.

y Bar. in L. si is qui pro tempore ff. de usu cap.

z Hiero. Franc. in d. L. jus nostrum de reg. jur. ff.

a Graff. Thesaur. com. op. § legatum q. 53.

b L. 5. ff. quando dies leg. ced. Graff. d. q. 43. Vasq. de succes. progress. lib. 3. § 29. n. 2.

c L. in conditionibus de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 20. n. 8.

d L. si post. in prin. ff. Quando dies leg. ced. & ibi Bar.

e Graff. d. q. 43.

f D. L. si post diem L. si Titio. ff. Quando dies, leg. ced. Graff. d. q. 43.

g L. cum Testator, C. de manumiss. test.

h L. si Titio, ff. quando dies leg. ced. L. si cui § 1. de leg. Graff. d. q. 43.

i Alex. consil. 55. vol. 2.

k Cujac. observa. l. 18. c. Vasq. de succes. progress. lib. 3. § 27. n. 3. & § 29. n. 3. in fin.

l L. si Titio quando dies, leg. ced. l. quibus diebus, § 2. de cond. & demon. ff. Bar. in L. si cui legetur § 1. de leg. l. Vasquius ubi supra.

m Alex. in L. senis ad Trebel. ff. Jas. post Bald. & Paul. de Cast. in d. L. si cui, § 1. de leg. l. Graff. Thesaur. com. op. § legatum q. 43. Vasqui. de succes. progress. lib. 3. § 29. n. 4. quæ opinio scilicet quod legatum hujusmodi non sit in diem, sed conditionale, ubi dies est incertus, quando (veluti post mortem alterius) ut communior, ita & est verior, ex relatione Graff. § legatum q. 43. n. 8. cui subscribit Mant. de conject. ult. vol. l. n. 3.

and

and ſo it is not material, whether the Teſtator ſay, I give to *A. B* an hundred pound when my Daughter ſhall marry, or when my Son ſhall die. In which caſe the uncertainty is ſaid to be joyned to the very ſubſtance of the Depoſition; or whether the Teſtator ſay, I give to *A. B.* an hundred pound, and I will that the ſame ſhall be paid when my Daughter is married, or my Son dieth [n]. In which Caſe, it is ſaid to be joyned to the Execution of the Depoſition [o]. For as well in the one caſe as in the other, if the Legatary die before the Marriage of the Teſtators Daughter, or death of the Teſtators Son, his Executors or Adminiſtrators cannot demand the Legacy [p].

But in very truth (if we look a little nearer unto the cauſe) the time of anothers death is not only uncertain, in reſpect of the queſtion *when*, but alſo in ſome reſpect of the queſtion *whether* [q]; for who is certain, whether that the other ſhall die before the Legatary? And this I ſuppoſe to be the principal cauſe, wherefore the Legacy which is given, or is to be performed after the death of another, is reputed to be Conditional: Namely, becauſe it is uncertain whether that time ſhall happen during the life of the Legatary [r]. For (10) if the queſtion be only when the time ſhall happen, and not *whether* it may happen during the life of the Legatary, then the Legacy in reſpect of Tranſmiſſion, is ſaid to be pure, and not Conditional [s]. As for example, the Teſtator giveth thee an hundred pound, to be paid the day before thy death; here the uncertainty is only when the time ſhall happen, not whether it ſhall happen during thy life: Wherefore in this caſe, after thy death, thy Executors or Adminiſtrators may recover the Legacy [t], and that without diſtinction, whether the uncertainty be joyned to the ſubſtance of the Legacy, as, I give thee an hundred pound the day before thy death; or, whether it be joyned to the Execution of the Legacy; as, I give thee an hundred pound to be paid the day before thy death [u].

Wherefore, where it is ſaid that when a Legacy is given after an uncertain time, if the Legatary die in the mean while, his Executors or Adminiſtrators are excluded from demanding the ſame Legacy, albeit the uncertainty be about this queſtion *when*; that Concluſion hath divers Limitations. The firſt Limitation or reſtraint is, in caſe alſo it be uncertain, whether the ſame ſhall happen, during [x] the life time of the Legatary; otherwiſe, if it muſt needs happen, during the life of the Legatary, then the Executors or Adminiſtrators of the Legatary are not excluded, although it be uncertain when it ſhall happen [y]. Another Limitation is, when (11) it is the meaning of the Teſtator, that the Executors or Adminiſtrators of the Legatary ſhall have the Legacy, notwithſtanding the death of the Legatary, in the mean time; for then the uncertainty of the time doth not make the Depoſition Conditional, becauſe the Teſtator may if he will, make that tranſmiſſible, which otherwiſe is untranſmiſſible [z].

[n] D D. in L. ſi cui, § 1. de leg. 1. ff.

[o] L. Bar. Paul. de Caſtr. Lancel. Dec. in d. § 1.

[p] Vaſqui. de ſucceſſ. progreſſ. lib. 3. § 29. n. 4. Mantic. de conject. ult. vol. l. 11. tit. 20. n. 1.

[q] L. hæres meus ff. de cond. & demon. & Bald in d. L.

[r] Bal. in d. L. hæres. Cui ac lib. 18. obſervat. cap. 1. Mantic. de conject. ult. vol. 11. tit. 20. n. 4.

[s] De L. hæres meus & ibi Bald. cum Paul. de Caſtr.

[t] D. L. hæres meus L. 4. ff. quando dies leg. ced.

[u] D. L. hæres. Et licet in illius legis exemplo incertitudo videri poſſit adjungi præſtationi legati & non ſubſtantiæ: Tamen cum ratio illius legis ſit generalis, & in utroque caſu militer, nempe quia dies non poteſt non cedere vivente legatario, vis legis non eſt per unicum exemplum anguſtanda.

[x] Bald. in d. L. hæres. Mantic. de conject. ult. vol. lib. 11. tit. 20. num. 4. Cujac. lib. 18. obſervat. c. 1. Jaſ. in L. ſi cui § hoc autem de leg. 1. num. 2.

[y] D. L. hæres meus ff. de cond. & demon.

[z] L. in conditionibus ff. de cond. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 20. num. 8. Vaſqui. de ſucceſſ. progreſſ. lib. 3. cap. 29. num. 15, 16.

What

What (12) if the Teſtator doth bequeath ſome Legacy, when the Legatary or ſome other perſon hath accompliſhed *a certain age*, whether (if the Legatary, or that other perſon die before that age) may the Executors, or Adminiſtrators of the Legatary obtain the Legacy [a]? This Queſtion I ſuppoſe is thus to be anſwered.

If (13) the time be joyned to the *ſubſtance* of the Legacy, then the Executors or Adminiſtrators of the Legatary deceaſed before the accompliſhment of that age, are without hope of obtaining the Legacy [b]. For example, the Teſtator doth give thee an hundred pound, when thou ſhalt be of the age of One and twenty years; thou dieſt before that time; thy Executors or Adminiſtrators cannot obtain the hundred pound [c], except in certain caſes, whereof the firſt (14) caſe is, when relation is made to the age of the Executor, who is charged with the payment of the Legacy, and not to the age of the Legatary, or of any third perſon [d]. For example, the Teſtator doth will or charge his Executor to pay unto thee an hundred pound, when he ſhall be of the age of One and twenty years, before which time the Executor dieth. In this caſe (by the opinion of divers [e]) thou mayeſt recover thy Legacy againſt the Executor of that Executor, dying at ſuch time as the former Executor, if he had lived, ſhould have accompliſhed the age preſcribed in the Teſtament. The reaſon is, becauſe the Teſtator is preſumed to bear greater love to his own Executor, on whom he hath beſtowed the reſidue of his Goods, than to the Executors Executor, whom peradventure he did not know [f]. Wherefore ſeeing the Teſtator charged his own Executor whom he more loved, the rather then is he preſumed to charge his Executors Executor whom he leſs loved [g]. Howbeit, if the Teſtator charge his Executor with the payment of the Legacy by this word *if*, as if the Teſtator command his Executor to pay unto thee an hundred pound, if he ſhall accompliſh the age of One and twenty years. Here the Legacy is Conditional, and therefore if the Executor die in the mean while, the Legacy dieth together with the Executor [h]. And ſo it is if the Executor be charged with payment of the Legacy after he be of ſuch age [i]: Nay more (contrary to that which is ſaid before) although the Teſtator do charge his Executor with the payment of the Legacy by this word *when*, as in the firſt example, even there alſo by the received opinion of the more part, the Legacy is concluded to be Conditional [k]: And therefore, if the Executor die before that age, the Legacy cannot be recovered againſt the Executor of the Executor deceaſed [l], no more than where it is given *after* his Executor have accompliſhed ſuch an age: For albeit this word (*after*) doth import a more full perfection of time than doth this word *when* [m], yet they differ not in making the Depoſition Conditional: For that is done as well by the word *when*, as by the word *after* [n]. What if the Executor being charged with the payment of the Legacy, when, or after he have ac-

compliſhed

[a] De hac q. uberrimè ſcripſit Vaſqui. de ſucceſſ. progreſſ. lib. 3. c. 19. & generaliter D. D. in L. ſi cui. § hoc autem ff. de leg. 1.

[b] L. ſi Titio f. Quando dies leg. ced. d. l. ſi cui, §. hoc autem, de Jaſ. l.

[c] D. D. in d. §. hoc autem.

[d] Bar. in d. §. hoc autem.

[e] Bar. Angel. Paul. de Caſtr. & Lancel. Dec. in d. § hoc autem per L. libertis quos § ab hæredibus ff. de Alimen. & cibar. leg.

[f] Bar. & Lancel. Dec. in d. §. hoc autem.

[g] Arg. à major. ad mi.

[h] Bar. in d. §. hoc autem, per. ſi L. ſervus ff. de ſtat. lib.

[i] L. fidei commiſſaria c. 1. § etiam, ff. de fide commiſſ. lib. & Bar. cum Paul. de Caſtr. & Lancel. Dec. in d. §. hoc autem ff. de leg. 1.

[k] Dyn. Sal. Imol. Raph. Cuma. Alex. Aret. & Jaſ. in d. §. hoc autem, quorum opinio communis eſt contra Bar. & ejus ſequaces, ait Jaſ. ubi ſupra.

[l] L. intercidit ff. de cond. & demon. ff. L. unic. §. fin. autem, C. de cad. to'.

[m] Jaſ. Alex. & alii in d. §. hoc autem.

[n] Ita contra Bar. ſentium Salis. Imol. Alex. & Jaſ. ac Moder. in d. §. hoc autem.

compliſhed a certain age, the Legatary himſelf do die, the Executor ſtill living, whether may the Executors or Adminiſtrators of the Legatary deceaſed recover the thing bequeathed of the Executor then living, after he have accompliſhed the age limited in the Teſtament? It ſeemeth that he may [o], becauſe the Condition is here extant; notwithſtanding, becauſe it is concluded that the Legacy in this caſe is Conditional, therefore howſoever the Condition do afterwards come to paſs, yet was the Legacy extinguiſhed by the death of the Legatary, the Condition then depending [p], and ſo cannot be recovered by his Executors or Adminiſtrators, unleſs it be proved (for it is not preſumed [q] that the Teſtator did mean the contrary [r].)

The ſecond caſe is in favor of liberty or freedom from bondage [s]. For example, the Teſtator doth manumit his villain, when his Son ſhall attain the age of One and twenty years. In which caſe albeit his Son do not attain to that age, yet ſhall the vaillain be free, at ſuch time as he ſhall have attained unto that age, if he had lived [t].

The third caſe is, when any Legacy is left to ſome godly uſe; for then alſo the Legacy may be recovered, notwithſtanding the death of that perſon, to whoſe age the Teſtator made relation [u].

The fourth caſe is, when the time tendeth to the diſſolution of the Legacy. For example, the Teſtator doth give thee Ten pound yearly, until his Son do attain to the age of One and twenty years. In which caſe, if his Son die in the mean time, thou maiſt obtain the Legacy of Ten pound yearly, until ſuch time as the Teſtators Son ſhould have attained to that age, if he had lived [x]: So likewiſe, if a man bequeath Twenty pound to *A. B.* to be paid in four years after the Teſtators death, who dieth, and after him the Legatary dieth alſo, before the four years be expired; yet in this caſe the Executors or Adminiſtrators of the Legatary, may recover the money bequeathed, or ſo much thereof as is behind or unpaid [y].

The fifth caſe is, when it is the will and meaning of the Teſtator, that the Legacy ſhould be tranſmitted [z].

But if the time of the age be not joyned to the *ſubſtance* of the Legacy, but to the *execution or performance* of the ſame; then the Legatary dying in the mean time, his Executors or Adminiſtrators may recover the ſame when the time is expired, wherein the Legatary, if he had lived, ſhould have accompliſhed that age [a]. For example, the Teſtator doth bequeath to *A. B.* a hundred pound, which he willeth ſhall be paid, when he ſhall accompliſh the age of One and twenty years. After the death of the Teſtator, the Legatary alſo dieth, before he have accompliſhed the age of One and twenty years. In this caſe the Executors or Adminiſtrators of the deceaſed Legatary may recover the ſame, when the time is accompliſhed, wherein the ſaid *A. B.* if he had been then living, might have recovered the ſame [b].

[o] Paul. de Caſtr. in d. §. Hoc autem in leg. p. adverſ. & multo fortius.

[p] L. unic. §. fin. autem C. de cad. to'. L. intercidit. ff. de cond. & demon.

[q] Num cùm præſumitur teſtator magis diligere ipſum legatarium quàm ejus executorem, licet velit dare primo, non ſequitur quòd debit ſecundo Bar. in d. §. hoc autem.

[r] L. in condi tionibus ff. de cond. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 20. num. 8. Bar. in d. § hoc autem in fin.

[s] L. ſi ita ſcriptum ff. de manumiſſ. teſta.

[t] D. L. ſi ita ſcriptum & DD. in d. §. hoc autem.

[u] Vaſqui. de ſucceſſ. progreſſ. lib. 3. §. 29 c. 5. in fin. ubi concluſionem hanc variis confirmat mediis.

[x] L. Ambiguitatem C. de uſu fruct. Bald. in d. L. ſi cui, ff. de leg. 1. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 29. n. 3.

[y] Brooks caſe, n. 50. Fulbeck. paraler. 1. parr. fol. 42. b. quamvis iſta limitatio propriè non eſt ſub regula prædicta, qua hîc tempus adjicitur executioni legati, non ſubſtantiæ. Vide addit. ad Specul. tit. de fraſib. & intereſſe § 1. n. 9. tit. 9.

[z] Bar. in d. L. ſi cui §. hoc autem in fin. Ba. in cand. L. & in L Sejus, a Trebel. ff. Paul. de Caſtren. in d. L. ambiguitatem n. 2.

[a] Bar. & alii in d. §. hoc autem per L. ex his C. quando dies leg. ced.

[b]

same [b]. What if the Teſtator bequeath to a young Maid an hundred pound, for, and toward her marriage, and ſhe dieth before ſhe be married, whether in this caſe may the Executors or Adminiſtrators of the Legatary, recover the Legacy againſt the Executors of the Teſtator deceaſed, yea, or no? The deciding of this doubt doth chiefly depend upon the Teſtators meaning, which, if it may appear, the queſtion is abſolved. For the Teſtators meaning is the predominant rule to be obſerved, as in many other, ſo alſo in this caſe. But if his meaning do not otherwiſe appear than by the bare words formerly recited; for mine own part I do ſubſcribe to their opinion, who do hold the Legacy to be pure and ſimple, not Conditional; and conſequently, that it is transferred to the Executors or Adminiſtrators [c] of the deceaſed Legatary, and recoverable by them; eſpecially, if ſhe live until ſhe were marriageable, though never married [d]. But if the Legacy had been given unto her, in regard of ſpecial marriage with ſome particular Man; as, I give and bequeath to *A. B.* for and toward her marriage with *C. D.* In this caſe, the Legacy is deemed to be Conditional, or, at leaſt, upon conſideration of her marriage with *C. D.* as the final cauſe of the Legacy, which otherwiſe he meant not to have bequeathed; and therefore ſhe dying before that marriage with *C. D.* the Legacy is extinct, and cannot be recovered by her Executors or Adminiſtrators [e]; yet if ſhe were contracted with the ſaid *C. D.* by words inducing Matrimony, albeit ſhe died before they were ſolemnly married in the face of the Church, it is holden, That the Legacy of an hundred pound is recoverable by her Executors or Adminiſtrators [f]; much more if ſhe were married to *C. D.* but died before they did lie together [g]. Moreover, if the Maid be very poor, or much affected by the Teſtator, whereby it is probable that the Teſtator did bequeath that ſum, in regard of her poverty, or of his own affection, rather than of the marriage with that Man. In this caſe though ſhe die before the ſaid marriage, the Legacy is tranſmitted to her Executor or Adminiſtrator, as a pure and ſimple Legacy [h]. But if the Teſtator do bequeath unto her an hundred pound, which he willeth to be paid at the day of her marriage: If ſhe die in the mean time, the Legacy dieth alſo, and therefore is not recoverable, by her Executors or Adminiſtrators, as hath been already declared [i].

[b] L. ex his verbis C. quando dies leg. ced. & D. D. ibid. Vaſq. de ſucceſſ. progreſſ. lib. 3. § 29.

[c] Bald. conſil. 249. vol. 4. Graver. conſil. 101. Covar. in c. 3. de teſta. extr. n. 11. verſic. ſecundo apparet. Dyer. fol. 1. 59. Fulb. paralet. lib. 1. fol. 42. Munoch. de præſump. lib. 4. præſ. 146. n. 16.

[d] Bald. in L. generaliter c. 2. C. de Epiſcop. & Cler. 10. & d. conſil. 249. Graſ. legatum, c. 48. n. 1. imo ante adventum nubilis ætatis legatum peti non poſſe videtur. Covar. in d. cap. 3. verſic. ſeptimo.

[e] Menoch. de præſump. lib. 4. præſ. 146. n. 6. ubi latiſſime de hac q. diſput. Bart. & alios in L. Titio centum §. genero. ff. de adminiſt. leg.

[f] Menoch. de præſump. 146. lib 4. n. 20. part. Bald. in l. ſi plures, c. de cond. incert. [g] Menoch. d. lib. 4. præſump. 147. [h] Covar. in d. c. 3. verſ. quinto Menoch. ſi præſ. 146. n. 21. Graver. d. conſil. tot. ubi ſequuntur, Bar. dicit. quòd quando apparere poteſt aliqua conjectura qua teſtator alias fuiſſet relicturus non dicitur tale legatum conditionale. [i] In eodem § num. 8. Fuib. lib. 1. paral. fol. 42. Dyer, fol. 59. Vaſqui. de ſucceſſ. progreſſ. lib. 3. § 29.

Sect.

Sect. XVIII. Of making an Executor Universally or Particularly.

1. *It is lawful to appoint an Executor, either Universally or Particularly.*
2. *The Universal Executor may enter to all the Testators Goods and Chattels; and therefore chargeable with payment of all his Debts.*
3. *The Particular Executor may meddle with no more than is allotted unto him; and therefore not charged, but according to his portion.*
4. *A Man may die both Testate and Intestate, in respect of his Goods.*
5. *Of a Particular and Universal Legatary.*

THirdly, (1) An Executor may be ordained either Universally or Particularly [a]: Universally, that is to say, when the Testator maketh an Executor of his whole Will, or doth commit unto him the Distribution of all his Goods; or when the Testator doth appoint an Executor indefinitely, that is to say, without any sign Universal, of *whole* or *all*. As, I make *A. B.* my Executor [b]. Particularly, that is to say, when the Testator doth commit the Execution of some part of his Will, or the disposing of some part of his Goods only: As if his Testator should make thee his Executor of his Plate, or of his Goods within the County of *York*, or of his Debts only [c].

He (2) that is made Executor Universally or Simply, may enter to all and singular the Goods and Chattels of the Testator [d], and in that respect is Universally and Simply chargeable with the payment of all and singular the Debts and Legacies of the Testator, so far as the same Goods and Chattels do extend [e].

He (3) that is made Executor Particularly, cannot meddle with any other of the Testators Goods and Chattels, than such whereof he is made Executor, and is only so far chargeable with the payment of the Debts and Legacies of the Testators, as the portion of the Goods to him allotted doth extend unto [f]. And if there be no other Executor appointed, the Particular Executor cannot meddle with the residue as Executor: For touching (4) the other Goods, the Testator by the Laws of this Realm, is said to die Intestate [g], and so may die partly Testate, and partly Intestate, not only in respect of time (as hath been before declared [h]) but also in respect of place, and of Goods [i], contrary to the Civil Law. And therefore if a Man have Goods in divers Dioceses, he may make Executors of his Goods in the one, and die Intestate, as touching his Goods in the other: And if he make Executors indefinitely, they may administer as Executors, in the one Dioceses, and refuse in the other, and take Administration of those Goods, as of one dying Intestate [k]. And so it is, if he have Goods in divers

[a] § Hæreditas Instit. de hæred. instit. Graff. Thesaur. com. op. §. Institutio, q. 21. n. 1. Fitzh. Abridg. tit. executor. n. 26. Brook. tit. execut. n. 2. & n. 155.

[b] L. 3. C. de mil. testam.

[c] Fitzh. Abridg. tit. execut. n. 26. Brook. eodem tit. n. 2. & n. 155.

[d] L. hæreditas de reg. jur. ff. & ibi Cagnol. Plowd. in Caf. inter Greisbrook. & Fox. & infra part. 6. § 3.

[e] Terms of Law, verb. Executor.

[f] Fitzh. & Brook. ubi supra L. si hæredes de leg. 1. L. legatorum de leg. 2. ff. Sichard. in L. 1. C. de impub. & al. sub. n. 4. Est enim eadem ratio partis ad partem, atque totius ad totum.

[g] Fitzh. & Brook. in locis supra scriptis.

[h] Supra eadem part. § 17. in prin. Brook. tit. Administrator. n. 45. Plowd. in Caf. inter Greisbrook. & Fox.

[i] Fitzh. tit. Executor. n. 26. Brook. eod. tit. n. 155.

[k] L. Abridgment des Cases. edit. An. Dom. 1599. tit. Execut. § 16. fol. 181.

Provinces [l]. And if the Teſtator by his Will declare that *A. B.* ſhall diſpoſe his Goods which be extant, in the hand and poſſeſſion of the ſaid *A. B.* Hereby he is made Executor of that parcel of Goods remaining in his cuſtody [m].

And here note (5) that as an Executor may be made Univerſally or Particularly; even ſo one may be made Particular or Univerſal Legatary, in reſpect of ſome Univerſal or Particular Legacy left by the Teſtator [n].

Howbeit, where the Teſtator doth leave all his Goods, or the reſidue of his Goods to ſome perſon, none elſe being appointed Executor, he to whom ſuch General Legacy is made, ſeemeth to be appointed Executor [o]; at leaſt, he hath been admitted to the Adminiſtration of the Goods of the deceaſed [p], as heretofore more largely [q]. But if the Teſtator give his Goods to one perſon, and make another Executor; this Executor is called *Nude* Executor, for that he reapeth no commodity by the Teſtament [r]. And here note, that if a Man by his Teſtament, deviſe all his Lands and Tenements in *D.* yet Leaſes for years do not paſs by theſe words, *Lands and Tenements*; for thereby is intended Frank-Tenements or Freehold, and not Chatels [s].

[l] Ibidem.

[m] D'Abridgment, f. 175. n. § 7.

[n] Vide ſupra 3 part. § 17. & hac. part. § 4.

[o] L. his verbis, ff. de hæredibus inſtit. & gloſſ. ac D.D. ib. Graſſ. Theſaur. com. op. §. inſtitutio. q. 14. Manric. de conject. ult. vol. lib. 4. tit. 3. n. 8.

[p] Et ita ſæpiſſ. practicari, obſervavi in foro Archiepiſcopi Ebor.

[q] Supra eadem part. § 4.

[r] Jo. de Athon. in legat. libertatem de Executor. Teſtam. Lindw. in c. ſtatutum, de teſta. lib. 3. Provinc. conſtit. Cant. & in c. religioſa eodem tit. verb. de damnis.

[s] Brooks Abridgment, tit. Done. n. 41.

Sect. XIX. Of making Executors by degrees.

1. *How Executors are made by degrees?*
2. *He that is made Executor in the firſt degree, is ſaid to be inſtituted, the reſt ſubſtituted.*
3. *Divers kinds of Subſtitutions, whereof certain have but little uſe in* England.
4. *Of the divers Forms of a vulgar Subſtitution.*
5. *Of the Effects of Subſtitutions.*
6. *So long as the Executor inſtituted in the firſt degree, may be Executor, the Subſtitute is not to be admitted.*
7. *If any one Executor in the firſt degree may be admitted, the Subſtitute is excluded?*
8. *What if every Executor have a ſeveral Subſtitute?*
9. *The firſt Subſtitute being repelled, whether the reſt be repelled likewiſe?*
10. *What if the Executor in the firſt degree, die Inteſtate?*
11. *The Admiſſion of the Executor inſtituted in the firſt degree, doth not always exclude the Subſtitute.*
12. *The Subſtitute ought to ſucceed in that part and quantity, which was aſſigned to the former Executor.*
13. *Where divers be ſubſtituted to one, whether they ſhall ſucceed equally or unequally.*

14. *Divers*

14. *Divers Caſes, wherein the Executors being unequally inſtituted, and the ſame alſo ſubſtituted, do ſucceed equally.*
15. *Of the great difference betwixt ſubſtituting by proper names, and ſubſtituting by names Appellative.*
16. *What if the Subſtitution be made by both names?*
17. *What if ſome be inſtituted by their proper names, others not?*
18. *What if it be doubtful, by what names they be ſubſtituted?*

FOurthly, An Executor may be made either in the firſt degree, or in the ſecond degree, or in the third, fourth [a], *&c.*

The (1) Teſtator is ſaid to make degrees of Executors, when he doth ſubſtitute one in place of another. For example, the Teſtator maketh his Wife Executrix, and if ſhe will not, or cannot be Executrix, he maketh his Son Executor; and if his Son be not Executor, he maketh his Brother Executor [b]. In which example, there be three degrees, whereof the Wife is in the firſt degree, the Son in the ſecond degree, and the Brother in the third degree. For look how many Subſtitutions there be ſucceeding one another; ſo many degrees there be beſides the principal Inſtitution, which maketh the firſt degree [c]: And who (2) ſo is Executor in the firſt degree, he is ſaid to be inſtituted; and they which are Executors in the ſecond, third, and fourth degrees, are ſaid to be ſubſtituted [d].

There (3) be divers kinds of Subſtitutions, or ſorts of placing of Executors one after another [e]; whereof, either becauſe we have no uſe at all [f] here in *England*, or very little [g], I ſhall only ſpeak of that vulgar or common kind of Subſtitution, whereof there is more uſe. Concerning the which, this is to be noted, That it (4) is lawful for the Teſtator to make ſo many degrees of Executors as he liſt [h], and he may ſubſtitute into the place of one Executor, either one or more; and into the place of many Executors, he may ſubſtitute one alone [i]. Likewiſe he may ſubſtitute or ordain many Executors, and appoint to every of them a ſeveral Subſtitute; or he may ſubſtitute one of the ſame Executors to another [k]; or the Teſtator having inſtituted divers Executors, may ſubſtitute Executors to ſome of them, but not to others [l].

It is alſo lawful for the Teſtator to inſtitute an Executor ſimply, and to ſubſtitute another in his place Conditionally [m]; or contrariwiſe, to inſtitute Conditionally, and to ſubſtitute Simply [n]. Simply, I ſay, not becauſe I deny any Subſtitution to be Conditional; for indeed every Subſtitution is in this reſpect Conditional, becauſe every Subſtitute is appointed with this Condition, *viz.* If the perſon to whom he is ſubſtituted, will not or cannot be Executor [o]. But I ſay Simply, when no

a L. poteſt quis ff. de vulg. pub. ſub. Inſtit. de vulg. ſub. in princ. Franc. poſt gloſſ. in c. ult. de teſtā. 6. Brook. tit. Execut. n. 9.

b D. L. poteſt. & ibi DD. Graſſ. Theſaur. com. op. §. Subſtitutio. q. 1.

c L. 1. L. poteſt. ff. de vulg. & pupil. ſub.

d Zaſ. Tract. de ſubſtit. in princ.

e Ut ſubſtitutio vulgaris, pupillaris, exemplaris, breviloqua, compendioſa; de quibus ſigillatim & copioſè Zaſ. in ſuo præclaro tractatu de ſubſtitutionibus.

f Ut de pupillari ſubſtit. & de exemplari, quæ pupillaris ſubſtitutio idcirco corruit; nempe ob defectum patriæ poteſtatis, ſine qua conſiſtere non poteſt (Inſtit. de pub. ſub. in princ.) & conſequenter cadit exemplaris ſubſtitutio, quum hæc ad pupillaris imitationem fieri dignoſcatur.

g Ut de breviloqua & compendioſa; quarum diſceptatione mirum in modum involvunt ſe DD. à quibus nihil ferè aliud quam quod ad fatigationem ſtudioſorum, & ad obſcuritatem rei, quæ vel ultro perdifficilis eſt, capere valeas. *h* Inſtit. de vulg. ſub. in princ. L. poteſt. eodem tit. ff. *i* § plures, Inſtit. de vulg. ſub. *k* D. § plures. *l* D. L. poteſt. & DD. in eand. L. *m* L. qui liberis de vulg. ſub. ff. *n* L. ſub conditione ff. de hæred. inſtituend. *o* Jaſ. in L. quamdiu ff. de acquir. hæred. in prin. Sichard. in Rub. de impub. & al. ſub. C.

other Condition is expreſſed or underſtood in the Subſtitution, than is expreſſed or underſtood in the Inſtitution [p].

Very (5) many, and infinite almoſt, are the divers Effects iſſuing from the divers kinds of Subſtitutions [q], the diſcourſe whereof would be much more laborious than commodious. Wherefore leſt I ſhould make long Harveſt about little Corn, I ſhall content my ſelf with Declaration of two Concluſions, whereby we may underſtand, *when* and *how* the vulgar Subſtitute is to be received or repelled, to or from the Executorſhip.

The firſt and principal Concluſion is this. So long (6) as he which is inſtituted Executor in the firſt degree, may be Executor, the Subſtitute, or he which is appointed Executor in the ſecond degree, cannot be admitted to the Executorſhip [r]; and likewiſe, ſo long as he may be Executor, which is aſſigned in the ſecond degree, he that is appointed in the third degree, is excluded: So by the firſt, the ſecond is repelled, by the ſecond the third, by the third the fourth, *&c* [s].

And if the (7) Teſtator do inſtitute divers Executors, ſubſtituting one or more, ſo long as any one of them which was firſt inſtituted, may be Executor, the Subſtitute is not to be admitted [t]; unleſs (8) the Teſtator do appoint to every Executor firſt inſtituted, his ſeveral Subſtitute; for then any one of thoſe firſt inſtituted Executors, not being able or refuſing to be Executor, his Subſtitute is to be admitted with the other Executors firſt inſtituted [u]: Whereas (9) otherwiſe any one of the Executors in the firſt degree lawfully undertaking the Executorſhip, all the Subſtitutes are excluded; not only thoſe which be placed in the ſecond degree, but alſo thoſe which be placed in the third and fourth [x]. In ſo much, that (10) if the Executor undertaking the Office, do afterwards die Inteſtate, yet the Executors inſtituted do ſtill remain excluded [y], and ſo by the Laws of this Realm, the Adminiſtration is to be committed of the reſt of the Goods of the Teſtator deceaſed, not adminiſtred by the Executor [z]: The reaſon is, for that they which are ſubſtituted, are made Executors Conditionally; that is to ſay, If he which is inſtituted Executor in the firſt degree, will not, or cannot be Executor [a]. Wherefore he that was firſt inſtituted lawfully, undertaking the Executorſhip, cannot be ſaid to be unwilling or unable; and ſo the Condition expireth, and is become deficient: Without the accompliſhment whereof, that is to ſay, unleſs the Executor in the firſt degree, will not or cannot be Executor, the Subſtitute cannot claim any thing [b]. Howbeit, if (11) the Executor inſtituted in the firſt degree, be deprived of the Executorſhip, by reaſon of his negligence in not performing the Will, then is the Subſtitute to be admitted [c]; likewiſe, if the Executor firſt inſtituted, notwithſtanding his intermeddling, be admitted to renounce the Executorſhip, then alſo the Subſtitute is to be received [d]: Likewiſe,

[p] L. qui libertis de vulg. ſub. ff.

[q] De quibus Zaſius, Politus Fumeus, & alii in ſuis Tract. de ſubſtitut.

[r] L. quamdiu, de acquir. hæred. L. cum in teſtamento de hæred. Inſtit. ff. L. poſt aditam. C. de impub. & al. ſub. Graſſ. Theſaur. com. op. §. ſub. q. 9.

[s] D. L. quamdiu. Zaſ. in d. Tract. de ſub. c. 1. n. 5.

[t] L. quidam de impub. & al. ſub. C. Zaſ. ind. Tract. de ſubſtit. c. 6. verſ. quinta concluſio. Sed conſulas Ripam in L. 1. ff. vulg. ſub. n. 187, &c. qui de hæc q. pluribus diſputat.

[u] Zaſ. in d. Tract. de ſubſtit. c. 1. membro 5. concluſ. 1. limit. 3.

[x] Bar. in L. 1. de vulg. & pub. ſub. ff. n. 47. & Ripa. ibid. n. 185. Dec. in L. poſt aditam. C. de impub. & al. ſub. n. 2.

[y] L. poſt aditam. C. de impub. & al. ſub. & Sichard. in eand. L. in 1. verſ. ita deinde.

[z] Brook. Abridg. tit. adminiſt. in 45. & tit. Executor. num. 149.

[a] Odofred. & Fulgo. in d. poſt. aditam. [b] Conſtat. alias à Jaſone, Sichardo, & aliis in d. L. poſt aditam. aſſignari rationes, quæ tamen non tanti ſunt apud nos momenti; non tamen erit inutile illos in hac re conſulere. [c] Zaſ. in d. Tract. de ſubſtit. c. 1. membro 5. concluſ. limit. 1. [d] Bar. in d. L. 1. de vulg. ſub. n. 49. cujus opinio communis eſt, teſtimonio Graſſ. Theſaur. com. op. §. ſubſtitutio, q. 15.

if

if he that is first instituted, de delay to take upon him the Executorship, by the space of thirty years, he is to be excluded, and the Substitute to be received [e]: But I suppose he is not to be excluded by lapse of lesser time, unless the Ordinary do assign a certain time, to take or refuse the Executorship [f]: Likewise, if he that is first instituted, cannot be Executor, the Substitute being appointed upon this Condition, if the former *will not* be Executor, nevertheless the Substitute is to be admitted, as if the former Executor had refused [g]. And finally, whersoever it is likely that the Testator would have substituted in the case not expressed, if he had remembred the same, as well as in the case expressed; there the Substitute is to be admitted, as if the same case had been expressed [h].

The second Conclusion is, That (12) the Substitute shall succeed in such part and quantity of the Testators Goods, as was assigned to him that was instituted Executor in the former degree, be it more or less [i]: So that if the instituted person were made Executor of the one half of the Testators Goods, the Substitute shall be admitted Executor of the other half; or, if the instituted person were made Executor of a third part, or of Goods in a certain place, the Substitute shall succeed and be admitted accordingly [k]. And (13) if divers be substituted to one, they shall succeed equally; but if the same Substitutes were also instituted Executors, and that unequally (for that perhaps to some more, to some less is allotted.) In this case, if any of the instituted Executors will not, or cannot be Executor, the portion of that Executor shall not be equally distributed amongst the substituted Executors, but according to the portion of the first Assignation; that is to say, he that is an instituted Executor of a greater part, shall be Substitute of a greater part; and he that was instituted of less, shall be Substitute of less [l]; (a ratable and just proportion observed.) The reason is, because the same affection is presumed in the Substitution, which was in the Institution [m].

Notwithstanding, if (14) the Executors unequally instituted, be substituted to a Legatary; then in case the Legatary will not, or cannot have the Legacy, the same shall be equally divided amongst the Substitutes [n].

Or if the Substitutes be equally charged by the Testator, then also they shall succeed equally, notwithstanding they were unequally instituted [o].

Or if the persons instituted Executors in the first degree, be assigned conditionally, the Substitutes assigned simply, shall not be charged with the performance of that Condition [p], unless they be substituted to a Conditional Legatary; for then the Condition expressed in the former Deposition, is understood to be repeated in the Substitution; and therefore the Substitute cannot obtain the Legacy, without the performance of the Condition [q]. Or unless the Condition, expressed in the

[e] Jas. in L. quamdiu. de acquir. hæred. ff. quam opinionem dicit esse communem, n. 9.

[f] Vide infra 6. part. c. 13.

[g] Bar. in d. L. 1. ff. de vulg. sub. & post eum Zas. in d. Tract. de subst. c. 1. verb. primus effectus.

[h] Bar. & Jas. ubi supra.

[i] L. 1. C. d. impub. & al. sub. §. & si Instit. de vulg. sub. L. si plures. ff. de vulg. & pup. sub.

[k] DD. in d. L. 1. Minsin. in d. §. & si plures. de vulg. sub.

[l] Bald. Paul. de Castr. & Sichard. in d. L. 1. de impub. & aliis, sub. C. Mantic. de conject. ult. vol. lib. 5. tit. 1. n. 20.

[m] Minsing. in d. §. & si Instit. de vulg. sub. per L. licet imperator ff. de leg. 1. & L. Publius. §. Titio. de cond. & demon. & Mantic. ubi supra.

[n] L. Unic. §. sed ut manifestetur. C. de eadem tol. & ibi Paul. de Castr. Sichard. in d. L. 1. de impub. & al. sub. col. 5. ver. nec movet.

[o] L. quoties ad Trebel. L. utrum § fin. de rebus dub. ff. Dec. in d. L. 1. n. 10.

[p] L. si sub conditione de hæred. instit.

& ibi Bar. Bald. Imol. & alii, ff. Et hæc est communis sententia, ut per Mantic. de conject. ult. vol. lib. 10. tit. 6. n. 2. [q] Dec. in d. L. 1. de impub. & al. sub. C. in fin. L. 1. § pro secundo, C. de cad. tol. quod tamen intellige ut per Mantic. d. conject. ult. vol. lib. 10. tit. 6. n. 9. cum seq.

Constitution,

Conſtitution, conſiſt in giving; for then it is repeated in the Subſtitution. As for example, the Teſtator doth make thee his Executor, if thou ſhalt give Ten pound to *A. B.* And if thou do not, then he doth appoint another to be his Executor. Though thou refuſe to give Ten pound to *A. B.* yet cannot that other be Executor, unleſs he give Ten pound to *C. D.* [r] becauſe this Condition of giving, expreſſed in the Inſtitution, is underſtood to be repeated in the Subſtitution [s].

Or (15) if in the Subſtitution, the perſons ſubſtituted be not all named by one name appellative, but every one ſeverally by his own proper name, then notwithſtanding they were firſt inſtituted Executors of unequal parts, the Diſtribution amongſt them as Subſtitutes ought to be equal [t].

By names *Appellative* in this place, I underſtand every name which is common, or may comprehend divers perſons, or all names except the Chriſtian name or ſirname of any perſon: As when the Teſtator doth Inſtitute his *Executors*, his *Children*, his *Brethren*, his *Kinſfolks*, all which I do account names Appellative in this preſent Caſe [u]. The cauſe of the difference (as moſt do think) is the force of this word *and*, which word being moſt commonly uſed, and almoſt neceſſary, whereſoever the Teſtator doth Subſtitute divers perſons by their ſeveral proper names, the nature and force thereof is ſuch, as it doth make equal Diſtribution [x]; without the which, the Subſtitution ſhall be proportionable to the Inſtitution; inſomuch, that if the Teſtator do Subſtitute divers by their proper names, without that word *and*; as if the Teſtator ſay, I Subſtitute the two *Johns* at *Noke*. In this Caſe the Executors being inſtituted unequally in the firſt degree, the Subſtitutes are to ſucceed unequally likewiſe [y].

But what (16) if the Teſtators do Subſtitute by both kind of names, as well by the Appellative, as by the proper names; or, what if ſome be ſubſtituted by the proper names, others by ſome name Appellative: What if it be doubtful by whether kind of name they were ſubſtituted. Whether in theſe Caſes, ought the Subſtitutes to ſucceed equally, or unequally, according to the proportion of the Subſtitution [z]?

When the Subſtitution is made by both names joyntly, we are to conſider, whether the names Appellative, or the proper names have the firſt place in the Depoſition: For if the Appellative go before, then the Subſtitutes are to be admitted, as if their proper names were not at all expreſſed, that is to ſay, according to the proportion of the Inſtitution: But if the proper names enjoy the firſt place, then the Subſtitutes are admitted equally, notwithſtanding their unequal Inſtitution [a].

When (17) ſome be ſubſtituted by their proper names, others by names Appellative; they which be ſubſtituted by their proper names, do ſucceed equally: The others according to the proportion of their Inſtitution [b].

When

[r] Menoch. de præſump. lib. 4. præſ. 177. n. 28. Jaſ. in L. licet imperator. de leg. 1. ff. n. 43.

[s] Ratio eſt duplex. 1. quia talis conditio habet vim relicti: Altera, quia ſi teſtator gravavit hæredem primo loco quem magis dilexit, multo magis hæredem ſecundo loco, quem minus dilexit. Jaſ. ubi ſub.

[t] L. nonnunquam ff. ad Trebel. & ibi DD. Viglius, & Minſing. in §. & ſi Inſtit. de vulg. ſub.

[u] Schird. poſt Paul. de Caſtr. & alios, in d. L. 1. de impub. & al. ſub. c. n. 5. in fin. Minſing. & Vigl. in d. §. ſi ex diſparibus.

[x] Paul. de Caſtro Jaſ. & Sichard. in d. L. 1. de impub. & aliis ſub. C.

[y] Idem Caſtrenſ. Jaſ. Sichard. in d. L. 1.

[z] Has quæſtion. cum multis aliis expeditas habet Jaſ. in d. L. 1.

[a] Jaſ. & Sichard. in d. L. 1. quæ opinio communis eſt, quam etiam adverſus Curtium defendit Viglius, in d. § & ſi ex diſparibus. Inſtitut. de vulg. & pupil. ſub. n. 7.

[b] Jaſ poſt, Salicet. in d. L. 1.

When it is doubtful, by whether names they be ſubſtituted (for that perhaps the Witneſſes do not remember what manner of words the Teſtator did uſe:) In this Caſe, they ſhall ſucceed according to the proportion of their Inſtitution [c].

[c] Bar. in L. 1. ff. de vulg. & pupil. ſub Jaſ. & Sichard. in d. L. 1. c. de impub. & al. ſub.

Sect. XX. How many may be appointed Executors.

1. *Either one alone, or more perſons may be appointed Executors.*
2. *What if the Teſtator make all the World his Executor.*
3. *What if he ſay, I make the poor my Executor, or the Church, or my Kin.*
4. *Where divers be named Executors, all are to be admitted, and not one without the reſt.*
5. *The Extenſions of this former Concluſion.*
6. *The Limitations of the ſame Concluſion.*
7. *Whether the Executor of the Executor, is to be joyned with the Executor ſurviving.*
8. *What if the Executor ſurviving die Inteſtate.*
9. *The Executor of the Executor, may ſometimes be ſued as Executor in his own wrong.*
10. *If the impediment be not long, the Executor is to be expected.*
11. *One of the Executors may execute when the reſt refuſe.*
12. *Whether the Co-Executor be excluded by his refuſal before the Ordinary.*
13. *Other Caſes wherein one Executor alone may ſue, or be ſued without his fellows.*
14. *Whether one Executor may ſue another.*
15. *Certain Caſes wherein one Executor may ſue another.*
16. *How the Goods are to be diſtributed among the Executors, to whom the Teſtator giveth the reſidue.*
17. *If the Teſtator make the Child in the Mothers Womb Exeeutor, and the Mother bring forth two or three Children at one birth, they are all to be admitted Executors.*
18. *If the Teſtator do bequeath an hundred pound to the Child in the Mothers Womb, and the Mother is delivered of two or three, whether are each of them to have an hundred pound, or but one hundred amongſt them?*
19. *What if the Teſtator make his Wife and the Child in her Womb, Executors, willing that if it be a Man-child, he to have two parts of the reſidue of his Goods, and his Wife but one? And if it be a Woman-child, then his Wife to have two parts, and his Daughter but one. Admit now the Mother have both a Son and a Daughter at one birth, how is the Goods to be diſtributed?*

Firſthly, Either one perſon (1) may be appointed Executor alone, or divers perſons together [a], even as many as the Teſtator liſts to appoint,

[a] § & unum. Inſtit. de hæred. inſtitu- end.

appoint; ſo that (2) the number be not infinite, as to ſay, I do make all the Men of the World my Executors [b]: For to appoint Executors in that ſort, were an argument that the Teſtator were not of perfect mind and memory [c]. Beſides that, it is impoſſible [d] for all to execute, and therefore avoid Aſſignation, at leaſt in effect [e]. But (3) if the Teſtator make the *Poor* his Executors, or the *Church*, or his *Kin*, giving to them the reſidue of his Goods, albeit he do not declare which Poor, what Church, or which Kinsfolks, nevertheleſs the Depoſition is not void, as elſwhere is declared [f].

When (4) the Teſtator doth make divers perſons Executors, they are all to be admitted to the Executorſhip, and not one alone without the reſt [g]; which Concluſion is diverſly both extended and limited.

The (5) firſt Extenſion is, that albeit the Teſtator do appoint his own Son, and a ſtranger his Executors; the ſtranger, if he can and will, is to be admitted with the Teſtators Son: For howſoever in this Caſe, by the Civil Law, the Teſtators Son is underſtood to be inſtituted in the firſt degree, and the ſtranger no more but ſubſtituted, or appointed in the ſecond degree; and ſo to be admitted, in caſe the Son cannot or will not be Executor [h], yet by the Laws and Cuſtoms of this Realm, it is otherwiſe, and both are to be admitted alike [i].

The ſecond Extenſion is, That although the Executors be appointed Alternatively, or Disjunctively. As for example, the Teſtator maketh *A. B.* or *C. D.* his Executors. In this caſe both the perſons are to be admitted Executors [k]; and this word *or*, in favor of Teſtaments, is taken for *and*, and ſo it is in effect; as if the Teſtator had ſaid, I make *A. B.* and *C. D.* my Executors, ſaving in certain Caſes elſwhere expreſſed [m].

The third Extenſion is, That where there be divers Executors, the Action commenced by them, or againſt them, ought to be commenced in all their names, and not in the name of ſome of them only [n].

The (6) Limitations of the former Concluſion are many, but they may all almoſt be reduced to two, whereof the firſt is, when the other Co-Executor *cannot be* Executor [o]; the ſecond is, when he *will not* undertake the Executorſhip [p]. For the better underſtanding of the which two Limitations: Firſt, concerning the former of them we are to note, whether the impediment be *perpetual or temporal*.

If the impediment be *perpetual*, becauſe perhaps the Co-Executor is dead, or perhaps ſuch a perſon as is utterly incapable of an Executorſhip, then he that is living and able to execute, may be admitted to the Executorſhip, notwithſtanding the impediment of the Co-Executor [q], unleſs the Teſtator did will expreſly, that the one ſhould not execute without the other [r]; otherwiſe, if (7) two be appointed Executors, and the one maketh his Teſtament, wherein he nameth his

Executor,

b Porcius in d. §. & unum. qui refert hanc opinionem eſſe communem, licet Graſſ. Theſaur. com. op. §. Inſtitut. q. 13. exiſtimet contrariam eſſe magis communem, nempe hujuſmodi inſtitutionem mero jure ſubſiſtere, ſed re & effectu irritam, & inanem reddi.

c Porcius in § & unum.

d Idem Porcius ibid.

e Gloſſ. in d. § & unum Graſſ. d. q 13.

f Infra 7. part. § 8. vide Dyer, fol. 160.

g C. religioſa, § ſane. de teſta. lib. 6.

h Gloſſ. & Bar. in L. Gallus § quidam rectè ff. de lib. & poſthu. Graſſ. Theſaur. com. op. §. Inſtitutio, q. 10. n. 6.

i Quippe ceſſante cauſa, & ratione juris civilis, nimirum inſtituendi neceſſitate, ceſſat & ipſius legis effectus c. cum ceſſante de app. extra.

k L. quidam, C. de verb. ſig. Mantic. c. de conject. ult. vol. lib. 4. tit. 3. n. 19.

l D. L. quidam, & ibid. Bar. & Jaſ.

m Infra 7. part. § 9. & ibi tres extant limitationes.

n Jo. de Arhon. in legatin. libertatem de execut. teſta. Brook. Abridg. tit. execut. n. 117. Intellige in executoribus hæreditarem adeuntibus, aliàs indiſtinctè in utroque caſu non eſt verum.

o C. religioſa § ſane. de teſta. lib. 6.

p Eodem § ſane in fin.

q D. § ſane & ibi Domini, & Phil. Franc.

r Eo-

Executor, and dieth, his Executor ſurviving. In this caſe the Executor of the Executor, is not to be joyned with the Executor ſurviving; neither in the Execution of the Will [f], nor in Suits or Actions [t]. And if the Executor of the Executor, have any Goods or Chattels in his hand, which did belong to the firſt Teſtator, the Executor of the ſame Teſtator ſurviving, may have an Action againſt the Executor of the Executor for the ſame [u]. Inſomuch, that if the (8) Executor ſurviving, do afterwards die Inteſtate, yet may not the Executor of the Executor meddle with the Goods of the former Teſtator; for the power of the Executor who died firſt, was determined by his death, the other then ſurviving [x]; and the Ordinary in this caſe may commit the Adminiſtration of the Goods of the ſurviving Executor, who died afterwards Inteſtate, to the Widow, or to the next of his Kin: And may alſo commit the Adminiſtration of the Goods of the former Teſtator not before adminiſtred, to the Widow, or next of Kin to the ſame Teſtator [y]. And (9) if the Executor of the Executor who died firſt, meddle with the Goods of the firſt Teſtator, he may be ſued by Creditors of the firſt Teſtator, as Executor in his own wrong [z].

If the (10) impediment be not *perpetual*, *but temporal*; then we are to conſider, whether the ſame be like to indure for a long time, or but for a ſhort time: If the impediment be like to continue long, for that perhaps the Co-Executor is beyond the Seas, or in ſome by-place far diſtant [a], or for that peradventure the Co-Executor is yet unborn, or but a Babe (for ſuch perſons may be named Executors [b];) then the other Executor is to be admitted in the mean time [c]; for the Law would not that Mens Teſtaments, or laſt Wills ſhould be deferred, but with all convenient ſpeed executed and performed [d]. But if the impediment be but of a ſhort time, then the one Executor is to expect his fellow, and is not in the mean time to be admitted alone to the Executorſhip [e].

When (11) the Executor may undertake the Executorſhip, but doth *refuſe* ſo to do, then is the other Executor to be admitted alone, and may execute the Will, or commence any Sute, or be ſued alone, as if none other had been named Executor [f]. Which Concluſion is true, if the Executor refuſing do ſtill perſevere in his unwillingneſs; but (12) if he alter his mind, and afterwards become willing, then ſo long as the Executor who proved the Will, is living, (his former refuſal before the Ordinary notwithſtanding he may by the Laws and Cuſtoms of this Realm, joyn with the other Executor, who proved the Will [g]. And if he releaſe any debt due to the Teſtator, the releaſe is as ſufficient, as if he had never refuſed [h]. Which is to be underſtood, if he releaſe before Judgment; but after Judgment, being no party in the Sute, he cannot acknowledge ſatisfaction, becauſe he was not privy to the Judgment [i]: Or if one releaſe, and afterwards take Adminiſtration of a Mans Goods dying Inteſtate, this ſhall not bar him, but that he may recover the debt, as Adminiſtrator unto him to whom the debt was due [k]; the Reaſon is evident, becauſe the right

f D. § ſane & ibi gloſſ.

t Brook. Abridg. tit. Executor, n. 92. 160.

u Brook. tit. Executor, n. 99.

x Brook. tit. Executor, n. 149.

y Eodem n. 149.

z Brook. Abridg. tit. Executor, n. 29. 99.

a Jo. And. & Phil. Franc. in d. §. ſanc.

b Ut infra part. 5. § 1.

c D. § ſanc. & DD. ibid.

d Franc. in d. § ſanc.

e Idem Franchus poſt Jo. And. in d. § ſanc. quod tamen verum eſt in Executoribus nudis non in mixtis. Simo d. Præti. De Interp. ult. vol. fol. 19. vol. 5.

f D. c. religioſa, §. ſanc. de teſta. lib. 6.

g Brook. Abridg. tit. Executor, n. 38. & n. 117.

h Brook. d. tit. n. 117. & n. 177. Do. Coke, lib. 5. In Middletons caſe.

i Dyer, fol. 319. n. 15.

k Dom. Coke, lib. 6. Relationum, fol. 28. Middletons caſe.

of the Action was not in him at the time of the Release [l]. To these two Limitations may a third be added, whereby one Executor may sue or be sued, without the other Co-Executor; namely, (13) when no Exception is made against the proceedings by the party [m]. Hereunto also may be added a fourth Limitation, that is to say, when any one of the Executors doth sell some of the Testators Goods for a sum of Money; for then that Executor which sold the Goods, may himself alone sue for the Money due for the same Goods [n]. What if the Testator make two Executors, whereof the one refuseth, and the other proveth the Will, who afterwards maketh others as Executors, and dieth. Whether may these Executors of the Executor, sue for the debt due to the first Testator, or the surviving Executor who refused? It is holden, that he which did refuse the Executorship, cannot assume that office after the death of his fellow Executor. And therefore the Executors of the deceased Executor, may sue or be sued for the debt of the first Testator, and not the surviving Executor, who did refuse the Executorship, whilest his Co-Executor lived [o]. And this may stand for a first Limitation, wherein one Executor may sue or be sued without the other.

Furthermore it is to be noted, That when the Testator doth make divers Executors, if (14) any of them do get the possession of the Goods of the Testator, the other Executor hath no Action for Recovery of the same Goods, or any part thereof [p]; for one Executor cannot for another. Howbeit, (15) if the Testator make divers Executors, and do bequeath to the one of them the residue of his Goods; it is not only lawful for him, to whom they are bequeathed, to retain the same; but also, if the other Executor enter thereunto, he is subject to an Action of Trespass [q]. Likewise, if the Testator do bequeath unto all his Executors the residue of his Goods, the same ought to be equally distributed amongst them. In which case, I suppose the office of the Ordinary, to whom they are accountable, is of great authority, if one of them seek to defraud another [r]. Which is to be understood whilest the said Executors be yet living; for if any of them happen to die, his part shall accrue to the Executor surviving: Unless the Testator by his Will, did declare, That the residue of his Goods should be equally divided amongst them. For these words, *Equally to be divided*, in a Will, do make a Tenancy in Common. In which case, if any of them die, the others surviving, yet nevertheless the Executors or Administrators of the party dying, may recover such part of the deceaseds Goods undivided, as he himself should have had, if he had lived [s]. Or if the Testator, making divers Executors, do bequeath to every of them a hundred pound, though one of them die, the others surviving, yet that hundred pound shall not accrue unto the survivors, but shall belong unto the Executors or Administrators of the deceased, as a distinct Legacy [t].

But (16) what if the Testator make many Executors, giving them the residue of his Goods, of which Executors he nameth one by his proper name, the rest by a name, collective. As for example, the Testator

[l] Ibidem.

[m] Jo. de Athon. in egatin. libertatem, de execut. testam.

[n] Brook. Abridg. tit. Execut. n. 65.

[o] Dyer, fol. 160. n. 42.

[p] Brook. tit. Execu. n. 98. part. 6. § 3.

[q] Brook. d. tit. Execut. n. 104.

[r] C. tua, nos de testam. extr. Brook. Abridg. tit. Accompt. n. 8.

[s] Dom. Coke, lib. 3. Relationum in Ratcliffes case, fol. 39. n. 5. ubi refert ita sæpius Judicatum fuisse, etiamsi nulla in facto intervenit bonorum partitio.

[t] Ratio est quia non sunt conjuncti nec re nec verbis, & ideo non est locus rei accrescendæ. Jas. post. Bar. in L. hujusmodi, ff. de lega. 3. n. 2.

Teſtator ſaith, I make my Brother and his Children my Executors, to whom I bequeath the reſt of my clear Goods: Whether in this caſe, ought the Father to have as much as all his Children, or whether ought every Child to have as much as the Father? I ſuppoſe, that in this caſe the reſidue of the Deaths part, ought to be divided into two parts, and that the Father ought to have as much as all the Children [u]; for it is delivered for a rule, That where divers perſons be comprehended under one name Collective, with another third perſon, then all they which be included under that one name, do repreſent one only perſon [x]. Of which rule, nevertheleſs there be divers exceptions; one is, when the Teſtator willeth the ſaid Goods to be equally divided amongſt them [y]. Another is, when the Children were not born at the time of the making of the Teſtament [z]. The third, and that is general, is when the Teſtator meaneth, that every perſon ſhall have a like portion [a]: For in thoſe caſes the rule doth not hold, but diſtribution is to be made according to the number of the perſons; that is to ſay, if there be three perſons, then the reſidue of the Deaths part is to be divided into three parts; and if there be four perſons, then into four parts; and if there be more, then into more parts; every part equal for every perſon.

If (17) the Teſtator do appoint the Child in the Mothers Womb his Executor, and it falleth out, that the Mother doth bring forth two or three Children at that one Burthen, they are all to be admitted Executors [b]: And as they are all to be admitted to the Executorſhip, ſo are they all to enjoy the Legacy. And therefore if the Teſtator ſay, I do bequeath a hundred pound to the Child, in the Mothers Womb, and if ſhe doth bear two or three Children, the Legacy is to be divided amongſt them [c]. But if the Teſtator ſay, if my Wife ſhall bring forth any Child, I give to the ſame an hundred pound; and ſhe bring forth two or three Children. In this caſe every Child may obtain an hundred pound, if the Teſtators Goods do ſuffice to ſatisfie the ſame [d], unleſs it be proved, that it was the Teſtators meaning, that they ſhould have no more but an hundred pound amongſt them [e].

What ſhall we ſay to this Queſtion? The (18) Teſtator maketh the Child in the Mothers Womb, Executor, and willeth, That if it be a Man-child, he ſhall have two parts of the reſidue of his Goods, and the Mother but one; and if it be a Woman-child, that then the Mother ſhall have two parts of the ſaid reſidue, and the Daughter but one. The Will being thus framed, the Mother bringeth forth a Son and a Daughter; how much of the Teſtators Goods is due to each perſon? In this caſe, every perſon is to have a portion anſwerable to the rate or proportion of the Teſtator [f], that is to ſay, the Son ſhall have twice ſo much as the Mother, and the Mother twice ſo much as the Daughter. For example, the reſidue of the Teſtators Goods ariſing to Sevenſcore pounds, the Son ought to have Fourſcore pounds, the Mother Forty, and the Daughter Twenty: So the Mother hath double

[u] Jaſ. in L. fin. de impub. & al. ſub. C. Dec. conſil. 236. & conſ. 25. 4.

[x] Jaſ. in d. L. fin. Mantic. de conject. ult. vol. lib. 4. tit. 9. quem operæ pretium erit videre.

[y] L. interdum & ibi. Paul. de Caſtr. ff. de hæred. inſtit. Dec. conſil. 597.

[z] Jaſ. in d. n. fin. per L. quidem § ſi tibi de reb. dub. ff.

[a] Jaſ. in eand. L. fin. quem velim videas, nam ibi tradidit regulam ſeptem limitationibus dotatam.

[b] Jaſ. in L. placet ff. de lib. & poſthu. Mantic. de conject. ult. vol. lib. 4. tit. 8. n. 4.

[c] Paul. de Caſtr. in L. qui filiabus, § 1. ff. de leg. 1.

[d] D. L. qui filiabus, § 1. & DD. ibid.

[e] Text. in d. § 1.

[f] L. Inſtit. ff. de lib. & poſth. Mantic. de conject. ult. vol. lib. 4. tit. 9. n. 12.

ſo much as the Daughter, and the Son hath double ſo much as the Mother.

But what (19) if the Will being ſuch as before, *viz.* That the Iſſue being Maſculine, ſhall have two parts, and the Mother but one; and being Feminine, to have but one part, and the Mother two; the Mother doth bring forth an Hermophrodite, or perſon having the parts both of a Man, and a Woman; whether ſhall this Hermophrodite have ſo much, as if two Children, Male and Female, had been both born? The Hermophrodite can have but one portion, that is to ſay, the portion due to that Sex, whereof the Hermophrodite doth moſt participate [g]; and if that alſo be doubtful, it is to be preſumed according to the more worthy kind [h].

[g] L. quæritur ff. de ſtat. hom.
[h] Addit. ad Bar. in d. L. quæritur.

Sect. XXI. The Executor of an Executor, and where he ſhall be charged, and what Actions are maintainable, by, or againſt him.

THe Executor of an Executor (where there is no Joynt-Executor) is Executor to the firſt Teſtator, and hath right to all the profit, and is liable to all the charge, that the firſt Executor had, or was ſubject unto. But the one Teſtators Goods, ſhall not ſtand charged for the other Teſtators Debts, but each for his own [a].

If an Executor of an Executor aſſume the Adminiſtration of the firſt Teſtators Goods, he cannot afterwards refuſe the Adminiſtration of the Goods of the latter Teſtator, but he may accept the latter, yet refuſe the former, but not *e contra* [b].

An Executors Executor ſhall not be admitted to Adminiſter the Goods of the firſt Teſtator, where the firſt Executor refuſed to Adminiſter, or died before *probate*, unleſs the *reſiduum bonorum*, after the Debts paid, be given by the Will to the firſt Executor [c].

Error, the Error aſſigned was, That the ſaid *W. E.* had brought an Action of Debt, upon an Obligation by the name of *W. E.* Adminiſtrator, *Bonorum & catallorum* A. E. *durante minori ætate* of *I. E.* Executor of the ſaid *A. E.* Executor of *R. Emry*, and demands Judgment upon an Obligation of 29 *l.* made to the ſaid *R. E.* the firſt Teſtator: Whereas he could not bring an Action by this name, but as Adminiſtrator of *E. E.* For by this Adminiſtration committed, he hath no authority to meddle with the Goods of the firſt Teſtator. And for this cauſe Judgment was reverſed [d].

Executor of an Executor cannot ſell the Land of the firſt Teſtator [e].

There are two Executors, one of them maketh his Executor and dieth. Debt lieth againſt the Executor which ſurviveth, and not againſt the Executor of him which is dead [f].

[a] 25 Ed. 3. c. 4. Pl. Com. f. 86. 34 H. 6. fol. 14. C. lib. 5. f. 9.
[b] T. 17 Jac. C. B. Wolfe and Heydens caſe.
[c] Dyer, fol. 372. T. 4 Car. C. B. Denns caſe. Croke, part. 1. fol. 115.
[d] H. 33 Eliz. B. R. Rob. Limmer verſ. Will. Emry. Croke, part. 3. fol. 211. n. 2. 27 H. 8. 7.
[e] Brook. Abridg. tit. Executors, p. 3. & tit. Teſtam. p. 1. 19 H. 8. fol. 4.
[f] 10 H. 6. 26. Brook, tit. Execut. p. 160.

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A Man makes two Executors and dies, one of the Executors maketh an Executor and dies; the other ſurvives, and dies Inteſtate. The Executor of the Executor ſhall not meddle; for the power of the Teſtator was determined by his death, and the ſurvivor of the other; and the Ordinary may commit Adminiſtration of the Goods of the Executor which ſurvived, and of the Goods not adminiſtred of the firſt Teſtator [g]. And if the Executor of the Executor, who died firſt, meddle with the Goods of the firſt Teſtator, he may be ſued by the Creditors of the firſt Teſtator, as Executor of his own wrong [h]. But where there is no Joynt-Executor, there moſt things which concern the immediate Executors, extend alſo to the mediate, or more remote Executors; and the mediate Executor in the fourth and fifth, or farther degree, ſtands in like manner Executor to the firſt Teſtator, as the firſt and immediate Executor, and may ſue and be ſued as the former.

[g] 32 H. 8. Brook. ibid. part. 149.

[h] 39 Hen. 6. fol. 45. Brook. ibid. part. 99. 29. 21 Ed. 4. 22. 10 H. 6. 26. 41 Ed. 3. 30, 31.

Deviſe that his Executors ſhall take the profit of his Land, until the Heir ſhall be of full age to pay part, one of the Executors die, after the ſurvivor maketh his Executor and die; the Executor of the Executor, who died laſt, ſhall have the profit, becauſe its an intereſt which ſurvives [i].

[i] Dyer, fol. 210.

In Debt againſt the Executor of an Executor; the Defendant pleaded, That the Executors Teſtator had fully Adminiſtred, and that he had nothing in his hands at the time of his death; and it was found, That he had Aſſets; whereupon a *Fieri facias* iſſued to the Sheriff, and he returned, That the Defendant had nothing. And it was held, That the Sheriff ſhould be amerced, for he ſhall be Eſtopped to make ſuch a Return; and that it ſhould be no prejudice to the Plaintiff, for that the Debt ſhall be charged ſo long as the Record remains in force, not Reverſed by Error nor Attaint. And if he hath no Goods of the Teſtators, he ſhall be charged of his own proper Goods; for that when he pleaded that the firſt Executor had fully Adminiſtred, he did not deny, but that Aſſets came to him after the death of his Teſtator [k].

[k] Paſche 3 Eliz. Moores Rep. fol. 23. n. 81.

Sect. XXII. Of an Infant Executor; an Executor or Adminiſtrator *durante minori ætate*; where Adminiſtration *durante minori ætate* ſhall be good; what Acts done by ſuch an Adminiſtrator ſhall be good; and where ſuch Adminiſtration ſhall ceaſe and determine. *Et è contra.*

AN Infant, how young ſoever he be, may be Executor [a]; yet the Execution of the Will ſhall not be committed unto him, until he attain the age of Seventeen years: For Adminiſtration granted *durante minori*

[a] Brook. Abridg. Tit. Executors. n. 11. Tit. Coverture. num. 56. 21 Ed. 4. 13.

minori ætate ceaſes, when the Infant Executor attains to that age of Seventeen years [b]. And if it be a Female Infant, and married to a Man of Seventeen years of age, or more; it is then, as if her ſelf were of that age, and her Husband ſhall have the Execution of the Will, and Adminiſtration thereof [c]. This Limitation of Seventeen years comes in by the Canon, not by the Common Law [d].

[b] C. lib. 5. Princes caſe.
[c] Brook. tit. Exec. n. 114. 20 Ed. 4. fol. 17. lib. 5. fol 29. 6. Princes caſe.
[d] Office of Execut. c. 18.

An Infant was made Executor, and Adminiſtration was granted to another *durante minori ætate* of the Infant, who brought Debt for Money due to the Inteſtate, and had the Defendant in Execution, and then the Executor came of full age. It was moved, that the Defendant might be diſcharged out of Execution, becauſe the authority of the Adminiſtrator is determined, and he cannot acknowledge ſatisfaction; and it was ſaid, That he was rather a Bailiff to the Infant, than an Adminiſtrator. But the Judgment of the Court was, That though the authority of the Adminiſtrator was determined, yet the Recovery and Judgment did remain [e].

[e] M. 29 Eliz. C. B. Goldesb. fol. 104.

A. brought an Action againſt *B.* as Adminiſtrator of *I. S.* during the minority of *C.* Iſſue being joyned, it was found for the Plaintiff: It was moved in Arreſt of Judgment, That the Declaration was not good, becauſe *non conſtat*, whether *C.* were Seventeen years of age at the time of the Action commenced, at which time the Adminiſtrators authority is determined: But it was adjudged, That the Plaintiff need not ſet forth that matter, firſt, Becauſe the Plaintiff is a ſtranger to the Defendants power. Secondly, the Defendant by joyning Iſſue, hath admitted that his power doth continue [f].

[f] T. 6 Jac. B. R. Croft and Walbanks caſe. Yelvert. Rep.

An account brought by an Adminiſtrator *durante minori ætate*, againſt the Defendant, as Bailiff of ſuch a Mannor, it was found for the Plaintiff. It was in moved in ſtay of Judgment, That it is not ſhewed that the Executor, the Infant, was within the age of the Seventeen years; and it might be, that he was above the age of Seventeen years, and yet under age. *Per curiam*, it ſhall not be intended, unleſs it be ſhewed, that he was above Seventeen years; eſpecially, when the Defendant hath admitted him to bring the Action, and had pleaded to Iſſue [g].

[g] M. 7 Car. Wells verſ. Some. Croke, part. 1. fol. 240.

An Infant Executor cannot releaſe or diſcharge a Bond, without receiving the Money due thereupon. Firſt, Becauſe it will be *a devaſtavit*, and charge the Infant Executor *de bonis propriis*. Secondly, It ſhould be a wrong, which an Infant by his releaſe cannot do: And thirdly, becauſe it is not purſuant to the office of an Executor; but all acts and things which he legally doth according to his office and duty of an Executor, ſhall bind him [h]. But if upon a ſingle Bond or Obligation, the Infant receive the Money, and make an Acquittance or Releaſe *per curiam*, it is good, and the Infant ſhould be bound thereby.

[h] H. 21 Eliz. B. R. Ruſſels caſe. Anderſ Rep. c. 212. C. lib 27. Moores Rep. fol. 146.

A Guardian recover in Debt upon an Obligation made to an Infant, the Defendant pay the Principal and Coſts, and prays, that the Guardian be ordered to acknowledge ſatisfaction: The Court ſaid, That a Guardian, or Infant, or Executor, may not acknowledge ſatisfaction for

for more then they receive; and for ſo much they ordered the Guardian to acknowledge ſatisfaction, and made an order that no Execution ſhould iſſue out for the reſidue [i].

Infant Executor, the Adminiſtration was committed *durante minori ætate*, Debt was brought againſt the Adminiſtrator, the Infant cometh of full age, and the Juſtices doubted much, if the Action did not abate [k].

If an Action be brought by an Adminiſtrator *durante minori ætate*, he muſt aver, that the Executor was ſtill within the age of Seventeen years, otherwiſe it is an Error: But if an Action be brought againſt ſuch an Adminiſtrator, there need no ſuch Averment [l].

Adminiſtration *durante minori ætate* of an Executor, is not within the Statute of 21 *Hen.* 8. to be granted of neceſſity to the Widow of the Teſtator, becauſe there is an Executor all the while, otherwiſe, if the Executor were made from a time to come [m].

Adminiſtratrix *durante minori ætate* of the Daughter Executrix, made divers Obligations unto the Creditors of the Teſtator, and after took Husband; the Court was of opinion, that ſo much of the Goods of the Teſtators, as amounted unto the value of the Debts paid, and undertaken by the Wife, the Husband might retain as his own. *Qu.* How the Caſe ſhall be, if the Wife die, for there the Husband is no longer chargeable [n].

A. made his Will, and thereby ordered, That none ſhould have any dealing with his Goods, until his Son came to the age of Eighteen years except *I. S. per curiam. I. S.* was Executor during the minority of the Son by this Will [o].

One makes an Infant his Executor, and dies, the Ordinary grants Adminiſtration to a ſtranger, during the Infants minority, after, when the Infant came of full age, he proved the Will: The Queſtion was, what remedy the Infant ſhould have againſt the Adminiſtrator for the Goods, *viz.* Whether a Writ of Account, or Detinue, or have his remedy againſt the Ordinary himſelf, to deliver him the Goods *per curiam*, he cannot have account, but a Detinue, or he may ſue in the *Eccleſiaſtical Court* for the Goods [p].

Error of a Judgment in Debt upon an Obligation. The Error aſſigned, was, Becauſe the Plaintiff ſues by Attorney, where he was an Infant, and ought to ſue by Guardian; but becauſe the Action was brought by him, as Adminiſtrator: So that he ſued *in auter droit*. Infancy is no impediment unto him, no more the Utlary; and therefore he might well ſue by Attorney, and the firſt Judgment was affirmed [q].

Debt as Adminiſtrator to *A. L. durante minori ætate* of *W. L.* the Executor upon an Obligation, and avers that *W. L.* was, within the age of Twenty one years, the Defendant pleaded an ill Bar; and it was thereupon demurred: But becauſe the Court was reſolved upon Conference with divers Civilians openly in Court, That the power of an Adminiſtrator *durante minori ætate*, doth ceaſe at the Executors age of Seventeen years; and, that Adminiſtration committed after that

i T. 14 Jac. B. R. White verſus Hall. Moors Rep. fol. 852. n. 1163.

k H. 39 Eliz. B. R. Ford verſus Glanvil. Moors Rep. fol 462. n. 648.

l H. 13 Jac. Rot. 970. Carver verſus Haſelrig. Hob. Rep. fol. 251. Croke, part. 2. 12. C. lib. 5. fol. 59. Piggots caſe.

m M. 15 Jac. Briers verſ. Goddard. Hob. Rep. fol 250.

n M. 15 Jac. Briers caſe. Hob. Rep. ibid.

o M. 27 & 28 Eliz. Brightman v. Keighly, Croke, part. 3. fol. 43. n. 3.

p 36 H. 8. Anderſ. Rep. c. 86.

q T. 38 Eliz. Rot. 143. Bade verſus Starkey, Croke, parr. 3. fol. 541. H. 37 Eliz. Rot. 251. Bartholomew verſus Dighton, Croke, part. 3, fol. 424.

that age of the Executor, is meerly void. And notwithſtanding, this Averment here, the Executor might be above the age of Seventeen years; and within the age of Twenty one. It was adjudged, that *querens nil caperet, &c.* [r]

[r] H. 40 Eliz. Piggot verſ. Gaſcoyn, Croke part. 3. fol. 602. C. lib. 5. fol. 29.

An Adminiſtrator *durante minori ætate* of an Executor, cannot grant a term of years, during the minority of the Executor: For ſuch an Adminiſtrator hath but a ſpecial property *ad commodum executoris*, but not a general property as another Executor or Adminiſtrator hath, and therefore his ſale of Goods, except they be *bona peritura*, or, it be for neceſſity of payment of Debts, which he is chargeable to pay, it ſhall not bind: But he may ſue and be ſued, and yet his authority is but a limited authority. And therefore like as if Letters *ad colligendum bona defuncti* were granted to one, then he may ſell *bona peritura*, as Fruit, or the like. It was doubted, whether ſuch an Adminiſtrator *durante minori ætate* might aſſent to a Legacy, or the Executor, *per Anderſon.* An Executor of the age of Eighteen years may aſſent; but whether the aſſent of an Adminiſtrator *durante minori ætate* be good, he doubted [s].

He cannot aſſent to any Legacy, except there be Aſſets to pay Debts.

[s] H. 41 Eliz. Rot. 1097. Price verſus Simpſon, Croke, part. 3. fol. 718. vid. lib. 5. fol. 29 b.

Debt upon an Obligation made to the Teſtator, the Defendant pleaded a Releaſe made by one of the Plaintiffs, the Plaintiff replies, That this Releaſe was made without any conſideration; and he who Releaſed, was within age at the time of the Releaſe made. It was thereupon demurred, and adjudged for the Plaintiff, That it was a void Releaſe, being by an Infant without conſideration [t].

[t] P. 40 Eliz. Rot. 1945. Knot & Knot Executors verſus Barlow, Croke, part. 3. fol. 671. lib. 5. fol. 27. Ruſſels caſe.

B. makes *Katherine* his Wife, and *John* his Son (aged one year) his Executors, *K.* proves the Will alone, and marries the Plaintiff, and they (without the Son) bring Action of Debt, as Executors againſt the Defendant, who pleaded in Abatement of the Writ, That *John* was made Executor with *Katherine*, and that he was yet alive, and not named, *&c.* The Plaintiff replied, That *John* was not above one year of age, that *Katherine* had proved the Will, and had Adminiſtration committed to her, during his minority, *&c.* Whereupon *Yelverton* demurred, and adjudged for the Defendant, *Quod billa caſſetur.* For that they are both Executors, and ought to be named in the Action [u].

[u] T. 6 Jac. B. R. Smith and Smiths caſe. Yelverton, Rep. fol. 60.

Debt by Executors upon an Obligation made to their Teſtator for payment of Fifty two pounds; the Defendant pleaded, That he paid the Fifty two pounds to one of the Executors in ſatisfaction of the ſaid Debt, and all Intereſt and Damages upon it; and thereupon Releaſed to him the ſaid Obligation. The Plaintiff replied, That the Executor who releaſed was within age: *per curiam*, This Releaſe by an Infant ſhall not Bar, becauſe the Infant being Executor, by courſe of Law is to have the benefit of the forfeiture of the Bond, and the intire ſum in the Bond, is a Debt due to the Executor; and the Infant being but one of the Executors, takes part of the Money only (although it be all which was due in Conſcience) yet this Releaſe ſhall not Bar him; but if he will take all the Money, and make a Releaſe, this is good. And if he will have remedy, he muſt have it in a Court

of

of Equity, and cannot plead this Releaſe in Bar at Common Law. Judgment for the Plaintiff accordingly [x].

Debt againſt an Executor upon an Obligation of the Teſtator, the Defendant pleaded, That the Teſtator made him Executor until *I. S.* ſhould come to the age of Twenty one years, and in the mean time keep all his Goods for him, and then deliver them unto him; and the ſaid *I. S.* then to be Executor, and ſhewed, That before the Action, *I. S.* came of Twenty one years, and he delivered Goods to him, which he accepted; it was debated by the Court, That if the firſt Executor waſted the Goods, how the Creditor ſhould relieve himſelf for thoſe Goods, the new Executor taking upon him the Executorſhip. It was argued, That the old Executor did remain Executor, as to have an Action againſt them, for againſt the Vendees they can have no remedy [y].

If an Infant be made Executor, Adminiſtration *durante minori ætate* may be committed to the Mother; but ſuch an Adminiſtrator cannot ſell the Goods of the Teſtator, except it be for neceſſity of payment of Debts, becauſe he hath the Office *pro commodo infantis*, and not to his prejudice [z].

[x] M. 13 Car. B. R. Kniveton verſus Latham. Croke, part. 1. fol. 490.

[y] T. 17 Jac. C. B. Chandler v. Thompſon, Hob. Rep. fol. 265.

[z] M. 1655. Ingram verſ. Fawſcot. Stiles Rep. fol. 463.

Sect. XXIII. Who ſhall be ſaid to be an Executor of his own wrong; and what Act ſhall make him ſo.

AN Executor of his own wrong, is he that takes upon him the Office of an Executor by Intruſion, not being ſo conſtituted by the deceaſed, nor for want of ſuch Conſtitution, ſubſtituted by the Court to Adminiſter. And therefore, if a Man dieth Inteſtate, and a ſtrange perſon takes the Goods of the Inteſtate, and uſe or ſell them; this makes him an Executor of his own wrong [a]. And thoſe to whom the Inteſtate was indebted, have no other remedy for the recovery of their Debts, but to charge him as Executor *de ſon tort*. But when an Executor is made, and he prove the Teſtament, and aſſume upon him the charge of the Will, and Adminiſter. In this caſe, if a ſtranger takes any of the Goods, and claim them as his proper Goods, and uſe and diſpoſe of them as his proper Goods. This doth not make him an Executor of his own wrong, becauſe there is a rightful Executor, againſt whom an Action lieth: And thoſe Goods which are ſo taken out of his poſſeſſion, after that he hath Adminiſtred, ſhall be Aſſets in his hands. And though there be an Executor which doth Adminiſter, yet if a ſtranger taketh the Goods, and claim to be Executor, pay, and receive Debts, or pay Legacies, and intermeddle as Executor. In this caſe, by ſuch expreſs Adminiſtration as Executor, he may be charged as Executor of his own wrong, although there be another Executor *de droit* [b]. When a ſtranger takes the Goods before the rightful Exe-

[a] T. 2 Jac. C. B. Roades caſe. C. lib. 5. fol. 33.

[b] C. lib. 5. fol. 34. 9 Ed. 4. 13.

cutor had assumed upon him, or proved the Testament. In this case, he may be charged as Executor *de son tort*: For the rightful Executor, shall not be charged, but with the Goods which come into his hands, after that he assumed upon him the charge of the Will [c].

[c] Lib. 5. ibidem.

He that takes the Goods of the deceased, to satisfie his own Debts or Legacy, is chargeable as Executor of his own wrong [d], an Executor *de son tort* cannot retain, to satisfie his own Debt [e], for great inconvenience would insue thereupon: For every Creditor, (and especially when the Goods of the deceased are not sufficient to satisfie all the Creditors) would contend to make himself Executor of his own wrong, to the intent, to satisfie himself by Retainer; by which means others would be barred, and it is not reasonable that any should take advantage of their own *tort*: But all loyal acts which an Executor of his own wrong doth, are good.

[d] M. 40, 41 Eliz. B. R. Coulters case. tit. 5. fol. 30 *b*.
[e] M. 6 Jac. Alexander versus Lamb. Brownl. p. 1. fol. 103. M. 11 Jac. C. B. Bond and Greens case, Godbolt. fol. 217. Moores Rep. n. 696. Irelands case.

If a Wife named Executrix, or not Executrix, take more Apparel of her own then is necessary, and convenient for her degree; this is an Administration: But if by the Assent or Delivery of the Executors it is not [f].

[f] 33 H. 6. fol. 31. Office of Executor, c. 3. 1 Eliz. Dyer, 167. Porters case, Brooks, tit. Administr. p. 6.

If one do either pay Debts of the Testators, or receive Debts, or make Acquittances for them, or demand the Testators Debts as Executor, or give away Goods which were the Testators, or delivered Money of the Testators for Fees about proving the Will, or being sued as Executor, do take it upon him, and plead in Bar as an Executor. All these are Administrations, and will make him Executor of his own wrong; although there be an Executor or Administrator of Right: But if he pays Fees or Debts only with his own Moneys, he is not.

But observe, That if one hath possession of Goods as Overseer, or by Letters, *ad colligendum*, or by Will, which is revoked, or by reason of expences *circa funeralia*; or if a *Feme Covert* refuse after the death of her Husband: All these, where an Action is brought against them, ought to plead the Special Matter, without that, that they Administred in any other manner; but he which claimeth an interest, ought to conclude *absque hoc, quia ut Executor* [g].

[g] 33 H. 6. 31. Dyer, fol. 167. 21 Ed. 4. fol. 5.

If the Bishop grant to *B. litteras ad colligendum, & ad vendendum ea quæ peritura essent & compotum inde, &c.* He to whom the Letters are granted, sell the Goods of the Intestate *quæ essent peritura*: He is an Executor of his own wrong [h].

[h] 9 Eliz. Dyer, fol. 256.

If a Man make a Deed of Gift of all his Goods and Chattels to another, and dieth Intestate: And this Deed is fraudulent, or but in trust, and the Donee after the death of the Donor doth dispose of these Goods and Chattels. By these means he shall be an Executor of his own wrong [i].

[i] Goldesb. fol. 116. n. 12. Brownlow. p. 1. fol. 38 & 385. M. 36, 37 Eliz. Rot. 1028. Kitchin verf. Dixon.

Where a Man is Executor of his own wrong, though Administration be committed to him afterwards, or to a stranger; yet the *tort* is not purged, but may be charged as Executor of his own wrong, because he hath once subjected himself to an Action; and therefore shall not discharge himself by Matter *Ex post facto* [k].

[k] P. 39 Eliz. C. P. Bradbury v. Reynel. Croke, part. 3. fol. 565. 21 Hen. 6. 8. 9 Ed. 4. 47. 2 R. 3. tit. 20. Ketw. 59.

An

An Executor of his own wrong may be ſued for Legacies, as well as a rightful Executor, *Per Popham & Yelverton*; but *Williams* doubted of it [l].

[l] Noyes Rep. fol. 13.

A Woman Executor took a Husband; afterwards they are devorced, *cauſa præcontractus*; the Woman appealed to the Court of *Delegates*, depending which Appeal, the Husband did intermeddle with the Goods, and afterwards the Wife died. It is a *Quære*. 2. *Mar. Dyer, fol.* 105. If this intermeddling ſhall make him an Executor of his own wrong. See *Lib.* 5. *Coulters* Caſe. That it is an Adminiſtration; for the very intermeddling with the Goods, is that which gives notice to the Creditors, againſt whom to bring their Action [m].

[m] 2 Mar. Dyer, lib. 5. Coulters caſe.

Debt brought againſt *B.* as Executor of his own wrong, he pleaded *ne unque Executor*, and it was found againſt him, and Execution was Awarded againſt him, for the which Debt, *viz.* Sixty pound for his falſe Plea, although, in truth, he had not intermeddled, but with one Bedſtead of ſmall value; and it was ſaid ſo to be adjudged 40 *Eliz. C. B.* in *Kitchin* and *Dixons* caſe [n].

[n] Noyes Rep. fol. 69.

The Executor of his own wrong, renders himſelf liable to the Action, not only of the right Executor, but alſo to the Suits of the Teſtators Creditors; yet but only ſo far as the Goods which he ſo wrongfully Adminiſtred, do amount unto [o].

[o] 6 H. 8. Dyer, fol. 2. T. 20 H. 7. Ketw. f. 63. M. 3 Car. B. R. Wirmore v. Porter. Croke part. 1. 89.

If a Man perform only acts of Charity or Humanity, as to bury the Body of the Teſtator, or feed his Cattle, or preſerve them by taking them into his cuſtody, or diſpoſe of them only about the Funerals, or make an Inventory thereof; he doth not hereby make himſelf an Executor of his own wrong, when there is an Executor or Adminiſtrator of right [p].

[p] T. 20 H. 7. Kelw. fol. 63. Brook. tit. Adminiſtr. n. 6. 28.

If a Man lodge in my houſe, and die there, leaving Goods therein behind him, I may keep them till I be lawfully diſcharged of them, without making my ſelf chargeable as Executor of my own wrong; for it will no more charge me, then if I took an Inventory of the deceaſeds Goods [q].

[q] Kelw. fol. 63.

E. P. is charged as Executrix *de ſon tort* Demeſn for taking of divers Goods into her hands to the value of 400 *l.* and ſells them by the aſſent and direction of *I. P.* her Son, who afterwards takes Letters of Adminiſtration, and paid the juſt Debts upon Specialties, as far as the Goods of the Inteſtate amounted unto, as well to the value of the ſaid 400 *l.* ſold by his Mother, as of all the Goods, whereof the Inteſtate died poſſeſſed; the Defendant pleads *plene adminiſtravit*. The Queſtion was, whether *E. P.* ſhould be charged as Executor of her own wrong, and adjudged that ſhe ſhould not be charged, but that the Plaintiff ſhall be barred: For the Action being brought after the Adminiſtration committed, and when ſhe was chargeable for thoſe Goods to the Adminiſtrator, and when the Adminiſtrator hath fully ſatisfied in paying the Debts of the Inteſtate, as far as the Goods of the Inteſtate amounted unto. It is not reaſon ſhe ſhould be charged by the Plaintiff, for then ſhe ſhould be double charged, *viz.* To the Adminiſtrator, and to the Creditors; neither is it reaſon, That more ſhould

be ſatisfied out of the Goods of the Inteſtate unto the Creditors, then the Goods of the Inteſtate amounted unto; and ſo much being ſatisfied, they ought not to have more: But if the Action had been brought againſt her, before the Adminiſtrator had fully adminiſtred all in Debts, peradventure it might have been otherwiſe[r].

[r] M. 3 Car. C. B. Whitmore verſ. Porter, Croke part. 1. fol. 89.

Debt againſt *A.* as Executor of *I. S.* he pleads, That he had taken Letters of Adminiſtration, Judgment of the Writ; the Plaintiff replied, That the Defendant Adminiſtred *de ſon tort*, and after took Letters of Adminiſtration, *&c.* And upon this it was demurred, *per curiam*, after the Defendant by his *tortious* Adminiſtration hath given advantage to be ſued as Executor, he cannot by his own act purge himſelf of this *tort*, and the Plaintiff hath Election to ſue him one way or other; for he ſhall not take advantage of his own *tort*[s].

[s] T. 28 Eliz. Rot. 407. Stubbs verſ. Rightwiſe, Croke, part. 3 fol. 102.

If Judgment be given againſt an Executor upon Demurrer, and Execution be Awarded, the Sheriff cannot Return, *Nulla habet bona Teſtatoris*, but is to return a *Devaſtavit*; as if it had been found againſt the Executor by Verdict: For he hath charged himſelf by his own Plea[t].

[t] Ibid. Croke, part. 3.

Debt *verſus A.* as Executor, he pleaded *ne unques Executor, &c.* And a ſpecial Verdict found, that Adminiſtration of the Goods of the Teſtator was committed to the Wife of the Defendant, who is dead; and that he kept *bonam partem bonorum* in his hands, and ſold them: *Williams* moved, That this Verdict was void for the incertainty, for *bonam partem* is altogether uncertain; but it was held well enough. For if he detain any part, it makes him Executor *de ſon tort, &c.* Wherefore it was adjudged for the Plaintiff[u].

[u] Anonymus, Croke part. 3. fol. 472.

Leſſee for years of a Reverſion, who dieth Inteſtate, his Wife aſſigned it by Parol to *A.* after the Wife took Letters of Adminiſtration, and made an Aſſignment thereof to *K. Per curiam* the ſale before Adminiſtration was not good, becauſe it was a Reverſion, and no Entry could be therein made, nor can any Man therein be Executor of his own wrong. But the laſt Aſſignment was good[x].

[x] P. 25 Eliz. B. R. inter. Kenruke & Burgeſs. Moore's Rep. n. 273.

The Executor of *A.* brought Action of Debt againſt *B.* as Executor of *D.* upon a Bond, the Defendant pleaded that *D.* died Inteſtate, and that before the Writ brought, Adminiſtration of his Goods was committed to *N.* who Adminiſtred, and yet doth; the Plaintiff replied, That *D.* died Inteſtate, and before the Adminiſtration granted, divers Goods of his came to the Defendants hands, which the Defendant, as Executor of the ſaid *D.* Adminiſtred, *Seu aliter ad ſuum proprium uſum diſpoſuit*; it was found for the Plaintiff: For ſince there was an Executor before the Adminiſtration granted, the Plaintiff had cauſe of Action veſted in him, which ſhall not be taken away by ſuch an Adminiſtration after granted; though it be before the Action brought: And the rather, becauſe the Goods taken by wrong before the Adminiſtration, ſhall not be Aſſets in the hands of the Adminiſtrator, till they be recovered, or damages for them[y].

[y] T. 12 Jac. C. B. Keble v. Oſbaſton. Hob. Rep. fol. 49.

If

If the Ordinary take Goods of the Inteſtate, being out of his Dioceſs. He is not to be charged as Ordinary within the Statute of *W.* 2. c. 19. Becauſe he took them of his own wrong [z].

[z] 12 Rich. 2. Adminiſtr. 21. Inſtit. part. 2. fol. 398.

Sect. XXIV. Of thoſe things which do appertain to the appearance of the Teſtament.

1. *Every Teſtament is to be proved by Witneſſes, or by Writing.*
2. *Two Witneſſes needful, and two ſufficient.*
3. *What if the Witneſſes be not free from all Exception, whether doth the number ſupply the Defect?*
4. *Sometimes one Witneſs is ſufficient.*
5. *Every one may be a Witneſs, which is not forbidden.*
6. *Three eſpecial Cauſes, which do miniſter Exceptions againſt Witneſſes.*
7. *Who are excluded for their diſhoneſty.*
8. *All Malefactors are not repelled from witneſſing.*
9. *Who are excluded for want of Judgment, and how long.*
10. *Who are excluded for Affection, and how far.*
11. *Whether a Legatary may be a Witneſs.*
12. *Whether a Woman may be a Witneſs.*
13. *Whether a poor Man may be a Witneſs.*

HAving ſpoken of the *general internal Form*, common to every *Teſtament*, that is to ſay, of the making of an Executor. Now let us return to the *general external Form*, that is to ſay, the Form whereby every *Teſtaments* may lawfully appear.

Wherefore (1) that Wills and Teſtaments may lawfully appear, it is requiſit that there be ſufficient proof, either by *Witneſs*, or by *Writing* [a].

Of Proof by Writing, it followeth afterwards in the handling of the particular Form of Written Teſtaments [b].

Concerning Proof to be made by Witneſſes, two things are eſpecially to be examined. Firſt, *How many Witneſſes* are required for the full Proof of a Teſtament, or laſt Will: Secondly, *What manner of Perſons* may be received for Witneſſes.

For the *Number*, By (2) the Laws and Cuſtoms of this Realm, two Witneſſes are needful [c]; and again, two are ſufficient [d]. So that as it is not neceſſary to have any more then two, ſo it is vain to have no more but one [e]. For the better underſtanding of the which twofold concluſion:

Firſt, where it is affirmed that two Witneſſes be ſufficient; that is to be underſtood, in caſe the ſame two Witneſſes be without cauſe of Exception [f];

[a] Maſcard. Trac. de probat. verb. Teſtamentum, alicqu'n præſumi quemlib. t ab inteſtato deceſſiſſe confirmat. Mantic. de conject. ult. vol. lib. 2. tit. 1.

[b] Infra eadem part. § 25.

[c] Ius autem civile exigit ſeptem. § ſed cum paulatim. & §. fin. Inſtit. de teſta. ordin.

[d] Lindw. in c ſtatutum verb. probatis de teſta. lib. 2. provinc. conſtitu. Cant. Peckius in c. privilegium de reg. jur. 6. n. 7. Trinitate, Hyppol. Singul. 102.

[e] Jaſ. in L. canct. C. de ſumma.

[f] ception

ception [f]; but if they be not lawful Witneſſes, two alone are not ſufficient for the Proof of a laſt Will [g]; at the leaſt where the ſame is to be proved in Form of Law.

But what if (3) the Witneſſes be not free from all Exception, but yet are more in number than two, ſuppoſe three or four: Whether be they ſufficient for Proof of the Will? It may be anſwered, That if the Exceptions whereunto the Witneſſes are ſubject, be light or ſlender, ſuch as do in part diminiſh the credit of their Teſtimony, as the Exception of friendſhip, domeſticity, or ſuſpicion of ſome ſmall fault, there the number doth ſupply the defect; and ſo the teſtimony of three Witneſſes, not altogether clear from thoſe Exceptions, is as the Teſtimony of two Witneſſes, without all Exception [h]: But when the Exceptions whereunto the Witneſſes be ſubject, are great and heinous; as the Exception of Perjury, which doth utterly extinguiſh all the credit of the Depoſition [i]; or, when the Witneſſes are ſubject to double Exception [k]; or, when the Law doth reſiſt the Examination of the Witneſſes, as of thoſe that be perpetually mad, or have no underſtanding; or, when the defect is not in the Perſon, but in the Depoſition [m]. In theſe and like caſes, the number doth not ſupply the defect, but the Teſtimony of them all is as the Teſtimony of none [n].

Secondly, Where (4) it is affirmed that one Witneſs is as none, yet ſuch is the power and authority of the Teſtator, that he may ordain that one Witneſs ſhall make a full Proof; as if the Teſtator commit ſomewhat in ſecret unto him (being loth perhaps that any other ſhould know thereof) and willeth in his life, that that Perſon alone ſhall be credited for the Declaration of his Will. In this caſe that one Perſon alone is ſufficient to prove the Contents of the laſt Will and Teſtament of the Perſon deceaſed [o].

For the ſecond Queſtion, that is to ſay, *What manner of Perſons* are to be received for Witneſſes. This may be delivered for a Rule, That (5) whatſoever Perſon is not by Law forbidden to be a Witneſs, the ſame Perſon is to be admitted [p]. This Rule is ſhort; but if we ſhould deſcend to the Exceptions, & ſhew in particular, what Perſons are in this caſe forbidden to bear Teſtimony by the Civil and Eccleſiaſtical Laws, we ſhould find it a matter of ſuch diſcourſe, as the ſame ſhould far exceed the quantity of this ſmall volume, for there be many volumes of this Argument only [q]. Beſides, it is a matter wherein very much is left to the diſcreet conſideration of the circumſpect Judge [r]; ſo that it is very hard alſo to preſcribe any certainty in this behalf [s]; only I will remember three (6) ſpecial Cauſes whereby the Witneſſes are not *omni exceptione majores*. The firſt is, Diſhoneſty in Manners; the ſecond is, want of Judgment or Underſtanding; the third is, Affection more to the one party; than to the other [t].

[f] C. relatum el. 1. de teſta. extr. Lindw. in d. c. ſtatutum. verb. probatis Mantic. de conject. ult. vol. lib. 6. tit. 3. num. 5, 6.

[g] D. c. relatum. & c. cum eſſes de teſta. extr. & ibi DD.

[h] Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 8.

[i] Maſcard. de probat. verb. perjurus. Ampl. 1. Alciat. de præſump. reg. 2. præſump. 10.

[k] Suarez. lib. recep. ſeu. verb. teſtis n. 215. Gabr. lib. 1. com. concluſ. tit. teſtib. concluſ. 7. n. 13. Hyp. de Marſil. Sing. 385. Menoch. de arbr. jur. lib. 2. cauſ. 99. Gravetta. conſ. 249.

[l] Felin. in c. dilecti. de accuſ. extra. Pariſ. conſil. 58. n. 52. vol. 4.

[m] Ruin. conſ. 149, 150. vol. 5. Gabr. lib. 1. com. concluſ. tit. de teſtib. concl. 6. n. 3.

[n] Vide eund. Gabr. de concl. 6.

[o] D. Theopom. ff. de dote præleg. Olden. de probat. fol. 286 b.

[p] L. § 1. ff. 1. de teſtib.

[q] Id quod pluſquam manifeſtum eſt per illum lib. qui inſcribitur Tractatus de teſtibus probandis, vel reprobandis. Var. authorum, &c.

[r] L. 3. § 1. de teſtibus, ff.

[s] Bar. Bald. & alii in d. L. 3. § 1.

[t] Has cauſas veluti præcipuas proſequitur. Albericus in tract. de teſtib. part. 1.

The

The firſt (7) Cauſe doth miniſter Exception, not only againſt perjured or forſworn Perſons convicted of a *Præmunire* of Forgery, upon the Statute of 5 *Eliz. cap.* 14. Or convict of Felony, or by Judgment loſt his Ears, or ſtood upon the Pillory, or Tumbrel, or been *Stigmaticus*, Branded, or the like, whereby they become infamous for ſome offences. *Quæ ſunt minoris culpæ, ſunt majoris infamiæ.* 43 *Ed.* 3. *Conſp.* 11. 27 *Aſſump.* 59. 33 *H.* 6. 55. 21 *H.* 6. 30. *Forteſc. c.* 26. *Stant. Pl. Coron. fol.* 174 [u]. But alſo againſt all other Malefactors, or Lawbreakers [x], which by any crime by them committed, become infamous [y]; for it is ſaid to be a Dignity, to be a Witneſs [z]. But all ſuch perſons as are infamous by their evil life, the Law eſteemeth unworthy of any Dignity [a], which alſo pondereth the credit of each Mans ſaying, with the gravity of his life [b]; and therefore light life, light credit alſo. Howbeit (8) amongſt many Limitations of this Exception, drawn from the evil life of the Witneſs [c], this is one, That if any Man having committed any crime, (Perjury excepted [d]) hath reformed his manners, clear from his former fault, and hath lived honeſtly, and laudably by the ſpace of three years before his ſaid production, ſuch a Perſon is not repelled from being a Witneſs [e]. So if a Perſon hath committed Felony, and a General Pardon cometh, and Pardon the Felony, he is a good Witneſs. See *Paſc.* 21 *Jac. in Camer. Stell.* Sir *Henry Fines* caſe, *Godbolt. Rep.* 288. For the Pardon doth not only take away *pœnam*, but *notam*; and when it is pardoned, the Perſon is cleared of the Crime and Infamy; and ſtands *notus in curia*, *vid. Trin.* 13 *Jac. Rot.* 933. *Hob. Rep. fol.* 81. *Cuddingtons* caſe.

The ſecond (9) Cauſe doth comprehend Children [f], Idiots [g], Lunatick Perſons [h], and ſuch like, of whom it may be ſaid as of the former; That as they which reform their evil manners, and afterwards live an honeſt and commendable life, are not to be repelled. So theſe Perſons being altered in their knowledge, that is to ſay, the Child being grown to years of diſcretion, the Idiot made wiſe, or the Lunatick Perſon not diſtracted by his fit, or frenzy, then their Teſtimony is to be received, even of thoſe things which were done, during the time of their minority [i], or madneſs [k]; ſo that they were not utterly void of underſtanding in thoſe former Eſtates [l].

The third (10) Cauſe, which is Affection, doth reach unto thoſe Witneſſes which be of Kinred or Alliance [m], or which be Tenants, Servants, or of the houſhold of the party producting them [n]; and to the Enemies of the party againſt whom they are producted [o]. *Item*, to all thoſe which are to reap any benefit by their Depoſition [p]; wherein (as in many things elſe) very much is attributed to the diſcretion of the Judge, who, as the Kinred or Affinity betwixt the Witneſſes, and

u De perjuri teſtimonio late Maſcard. de probat. verb. perjurus concluſ. 1168.

x De teſte criminoſo idem Maſcard. de probat. verb. criminoſus, concluſ. 469.

y De infamibus ſive juris, ſive facti, optimè. Jaſ. in L. cunctos C. de ſumma Trinitate.

z Auſtr. Trac. de teſtibus verb. dignitas.

a Ac infamibus de reg. jur. 6.

b L. 2 & 3. ff. de teſtibus.

c De quibus Maſcard. & Jaſ. ille concluſ. 464. concluſ. 1168. hic in L. cunctos. C. de ſumma Trinitate.

d Maſcard. de probat. concluſ. 1168. n. 16.

e C. teſtimonium de teſtibus extr.

f § Teſtes Inſtit. de teſta. ord.

g Rebuff. de reprobat. & ſalvat. teſt. verb. furioſus. Campag. tract. de teſtibus, reg. 114. Bar. tract. de teſtibus, n. n. 98. ubi conſtituit differentiam inter ſtultos & fatuos.

h D. § teſtes & Minſio. 11 § furioſi. Inſtit. de Curator. ubi diſtinguit inter furioſum & mente captum.

i Angel. Are. in d. § teſtes. Alberic. tract. de teſtib. c. 5. n. 18.

k Maſcard. tract. de probat. verb. furioſus concluſ. 828.

l Jul. Clar. pract. crim. q. 24. Alberic. l. tract. c. 5. num. 24.

m De quibus Alberic. d. tract. cap. 1. & Hector. Æmilius tract. de teſtibus verb. affinis.

n De is teſtibus, idem Alberic. de tract. c. 2.

o Inimicus quatenus repellendus, docet Maſcard. in d. tract. de probat. concluſ. 899. quatenus verò recipiendus, Campegius, tract. de teſtit. reg. 23.

p Albericus, tract. de teſtibus, 4.

the

the party, is near or far off; the fear of Tenant, or Servant, or the diſpleaſure of his Lord and Maſter, great or little, the enmity betwixt the Witneſs, and the adverſe party, hot or cold; or the commodity the Witneſs is to reap, more or leſs: So the wiſe Judge ought to give more or leſs credit to their Sayings and Depoſitions [q].

What ſhall we ſay of the Teſtimony of theſe Perſons, namely, of a Legatary, of a Woman, and of a Poor Man?

I ſuppoſe the (11) Teſtimony of the Legatary to be good for the reſt of the Will [r], but not for his own Legacy [s]; and therefore where there be but two Witneſſes of a Will, wherein either of them hath ſomewhat bequeathed unto him, this Will is not ſufficiently proved for thoſe Legacies [t]: But for the reſt of the Will it ſeemeth to be ſufficiently proved [u].

But by the Law of this Realm, the Legatee is no good Witneſs, becauſe he ſhould be *Teſtis in re propria*, which the Law will not admit: For if his Teſtimony be good, as to the Will by conſequence, and *ſecundario*, he doth thereby make good his own Legacy. And therefore in the Caſes of Tenants Right, Common, *Modus decimandi*, and the like, the Courts of Juſtice will not ſuffer them to be Witneſs one for another; but if the Legatee doth Releaſe his Right to the Legacy, his Teſtimony is to be received. *P.* 14 *Jac. C. B.* The Lord *William Howards* caſe, *Hob. Rep. fol.* 91, 92.

A Woman (12) is alſo a good Witneſs in this caſe by the Laws Eccleſiaſtical [x]: And whatſoever divers do write, that a Woman is not without all Exception [y], becauſe of the inconſtancy and frailty of the Feminine Sex, whereby they may the ſooner be corrupted [z]; yet I take it that their Teſtimony is ſo good, that a Teſtament may be proved by two Women alone, being otherwiſe without Exception [a].

A Poor Man (13) likewiſe, being an Honeſt Man, is not forbidden to be a Witneſs [b].

An Alien may be a good Witneſs, as it was adjudged. *P.* 14 *Eliz. Duke de Norfolks* caſe; but an Infidel cannot, *Forteſc. c.* 25. *Inſtit. part.* 1. *fol.* 6. *b.*

[q] De hujuſmodi teſtibus, Hector Æmilius, i. tract. de teſtib. verb. affectionem habens, Gabr. lib. 1. com. concluſ. tit. de teſtib. conc. 9, 10, 11, 12, 13, 14, 15, 16. Panor. in c. ſuper eodem de teſtib. extr. n. 8. Rebuff. de reprobat. & ſalvar. teſtium verb. inimicus, verb. domeſticus, & verb. conſanguineus.

[r] § Legatariis, Inſtit. de teſtam. ord. [s] Porcius, in d. § Legatariis.

[t] Bar. in L. omnibus C. de teſtibus, & Porcius in d. § Legatariis.

[u] Albericus, tract. de teſtib. c. 4. n. 57. n. hoc ar. Vivius, com. opin. verb. teſtis.

[x] Panor. & Covar. in c. cum eſſes de teſta. extra.

[y] Dec. in L. fœmina de reg. jur. ff. Gravetta. conſil. 99. n. 5.

[z] C. Forus, de verb. ſignif. extr.

[a] Sichard. in L. hac conſultiſſima § ex imperfecto. C. de teſta. Ripa, tract. de peſte. c. 2. n. 14. quæ ſententia communis eſt. Covar. in d. c. cum eſſes n. 14. [b] Vivius Theſaur, com. op. verb. teſtis. Tu verò Juſtinianiſta, vide Gabr. lib. 1. com. concluſ. tit. de teſtib. concluſ. 18. ubi tradita eſt regula de paupere teſte, variè tùm ampliata, tùm limitata.

Sect.

Sect. XXV. Of the particular Forms of Teſtaments.

1. *So many particular Forms, as kinds of Teſtaments.*

THe (1) particular Forms of Teſtaments be no fewer in number, than are the ſeveral kinds of Teſtaments: For every kind hath his particular Form, by the which it differeth from the reſt [a].

The ſeveral kinds of Teſtaments are theſe; that is to ſay, ſome be Solemn Teſtaments, and ſome be Unſolemn; ſome Written, and ſome Nuncupative; ſome Priviledged, and ſome Unpriviledged [b]. Of the particular Forms of every of which kind, albeit I have already ſaid ſomething in their ſeveral Definitions; yet now alſo it ſhall not be in vain to add thereunto theſe things following.

a L. Julianus §. ſi quis ff. ad exhibendum.

b Supra prima parte § 8, 9, 10, 11, 12, 13, &c.

Sect. XXVI. Of the Form of a Solemn Teſtament.

1. *Divers things ought to concur to the Form of a Solemn Teſtament.*
2. *No Man tied to the Obſervation of this Solemn Form.*

IN the making of Solemn Teſtaments, many things are requiſit, whereof if any one be wanting, it is not reputed a Solemn Teſtament [a].

Firſt, (1) It is requiſit that there be ſeven Witneſſes preſent at the making thereof [b].

Secondly, They muſt all be required, neither is it ſufficient, that they be preſent by chance or unrequired [c].

Thirdly, It is required, that every Witneſs do ſubſcribe his name with his own hand, if he can write, or elſe two or three others for him [d].

Fourthly, It is requiſit, that the Teſtator do with his own hand write his name, whom he will ſhall ſucceed, and have all his Goods; and if he cannot write, that then he name him before thoſe Witneſſes [e].

Fifthly, It is requiſit that the Witneſſes be ſuch as are not forbidden to bear Teſtimony in that behalf [f].

a § ſed cum paulatim Inſtit. de teſta. ordin. & ibi Minſing.

b D. § ſed cum paulatim.

c Auth. rogati C. de teſta. L. hæredes palam ff. de teſtam.

d L. ſingulos de teſta. ff. & Minſing. in d. §. ſed cum paulatim.

e L. jubemus L. cum antiquitas C. de teſta. Non tamen ita neceſſaria eſt nominatio hæredis, ut proprio teſtator ore fiat, quin ſufficit ſi teſtator, alio interrogante, an velit talem fore hæredem? reſpond.

f Inſtitut. de teſta. ordin. ita DD. in d. L. jubemus Graſſ. Theſaur. com. op. §. Inſtitut. q. 17. §. teſtes.

Sixthly, It is neceſſary that the Witneſſes do ſee and behold the Teſtator, and not hear him only [g]. It is alſo neceſſary, that the Witneſſes do ſeal the Teſtament either with their own Seals, or with the ſeal of another [h].

Finally, It is neceſſary that the Teſtament be made at one time, without any intermiſſion, except natural, ſuch as cannot be avoided [i].

A Will thus (2) made, is called a Solemn Teſtament, which Form if Men would obſerve, (but no Man is neceſſarily tied thereunto here in *England* [k]) it were a more ſafe way, as well againſt the forging of falſe Wills, as ſuppreſſing of true Wills.

[g] Menoch. de arbitr. Jud. q. lib. 2. cent. 5. caſ. 475. n. 23. Minſing in d. §. ſed cum paulatim.

[h] D. §. ſed cum paulatim.

[i] Eodem §. & ibi Minſing.

[k] Supra part. 1. § 9.

Sect. XXVII. Of the Form of an Unſolemn Teſtament.

1. *What is requiſite in the making of an Unſolemn Teſtament.*

IN the (1) making of an Unſolemn Teſtament, it is not preciſely neceſſary to uſe any of the aforeſaid Ceremonies. This only is needful here with us in *England*, that the Teſtator do appoint his Executor, and declare his Will before two or three Witneſſes, whoſe Teſtimony, partly by the Laws Eccleſiaſtical [a], and eſpecially by the General Cuſtom of this Realm [b], is ſufficient for the Probation and Approbation of the ſame Will, concerning the Appointing of an Executor, or the Diſpoſing of Goods and Chattels [c].

[a] C. cum eſſes c. relatum, cl. 1. deteſta. extr.

[b] Lind. in c. ſtatutum, verb. probatis lib. 3. Provincial. conſtitu. Cant. tract. de repub. Angl. lib. 3. c. 7. Peck. 9. in c. privileg. de reg. jur. 6.

[c] Atque huc tendit quod ſcriptum reliquit Minſing. in Rub. de mil. teſta. num. 6. Videlicet, apud eas gentes quæ juris civilis obſervatione non tenentur (quarum Anglic. eſt præcipua) jus militaris teſtamenti obtinere, ſi qua nulla propria lex extet.

Sect. XXVIII. Of the Form of a Written Teſtament.

1. *Divers things conſiderable in a Written Teſtament.*
2. *In what Matter or Stuff the Teſtament is to be Written.*
3. *In what Language the Teſtament is to be Written.*
4. *In what Hand the Teſtament is to be Written.*
5. *With what Notes or Characters a Teſtament is to be Written.*
6. *Limitations of the former Concluſion.*
7. *Of the Words and Sentences of a Written Will.*
8. *Whether Witneſſes be neceſſary in a Written Will.*

9. *How the Witneſſes are to depoſe in proving the Will to be Written by the Teſtator.*
10. *What if the Teſtament be found in the Teſtators Cheſt.*

VVE have heard elſwhere, in what Caſes it is needful that the Teſtament be Written [a], namely, where the Teſtator doth deviſe any Lands, Tenements, or Hereditaments [b]; and alſo when the ſame ought to be written, that is to ſay, in the life time of the Teſtator [c]; with divers other Queſtions there abſolved. Now (1) let us hear of ſome other things which may ſeem to appertain to the Form of a Written Teſtament; namely, *In what Matter or Stuff* the Teſtament is to be Written, *in what Language*, with *what Hand*, *Letters*, *Notes*, *or Characters*, with *what Words or Sentences*; and whether it be always neceſſary that there be *Witneſſes* of a Written Teſtament.

For the (2) *Matter* wherein the Teſtament is Written, the Law regardeth not whether it be Paper or Parchment, or other like Stuff apt for Writing [d].

Neither is it material in what (3) *Language* [e] the ſame be Written, either *Latin*, *French*, or any other Tongue.

For the (4) *Hand or Letters* wherewith the Teſtament is Written, the Law is indifferent whether it be Secretary Hand, *Roman* Hand, Court Hand, or any other Hand, either fair, or otherwiſe, ſo the ſame may be read and underſtood [f].

For the (5) *Notes or Characters*, it skilleth not whether the ſame be *uſual or unaccuſtomed* [g]. Uſual or accuſtomed Notes be theſe, xx *s.* for Twenty ſhillings, Cl *l.* for an hundred and fifty pounds, 1590. for a Thouſand five hundred fourſcore and ten, with ſuch like, whereof I might bring infinite examples. Unaccuſtomed Notes and Characters be, as when the Teſtator doth uſe the Figure (1) inſtead of the Letter (A,) the figure (2) inſtead of the Letter (B,) the figure (3) inſtead of (C,) *&c.* or perhaps ſome other more ſtrange Characters than theſe in place of Letters. Howbeit, (6) if the Characters be ſuch as the ſame cannot be read or underſtood, the Teſtament is as if it were not written [h]; or if they may be read or underſtood, either by the ſame, or by ſome other writing, or by any other means; yet if that writing were but a draught, or preparation to the Teſtament, and not the Teſtament it ſelf, it is without any force [i].

Words (7) *and Sentences* are not required for the Form of a Teſtament, but for the Expreſſing of the Will, and Meaning of the Teſtator [k]; and therefore, if the Writer by error omit ſome words, where-

a Supra 1. part. § 11.
b Stat. H. 8. an. 32. c. 1.
c Eodem Stat.
d §. Nihil Inſtit. de teſta. ordi. Spec. de Inſtit. edit. § 8. n. 21. Sed quid ſi quis ſcripſerit voluntatem ſuam in pulvere, numquid valebit teſtamentum ut ſcriptum? Et videtur quod ſic per L. milites. C. de teſta. Hoc uno ſubaudito, nimirum noſtratium teſtamenta, omni immunitate, atque adeo jure militari gaudere, ut ſcriptum reliquit. D. Smitheus tract. de repub. Angl. lib. 3. cap. 7. Contrarium tamen, ſcilicet non valere hujuſmodi teſt. tanquam in ſcriptis conditum, exiſtimo: ſaltem ad effectum illum, de quo fit mentio in d. ſtat. H. 8. an. 32. cap. 1. id quod ex mente illius ſtatuti facile colligere licet. Et huc pertinet quod

ſcriptum reliquit. Molun. in L. 1. §. eodem. ff. de verb. ob. n. 9. *e* Minſing. in d. §. nihil. *f* DD. in L. quoniam, C. de teſta. *g* Hoc intelligant Juſtinianiſtæ procedere jure gentium quo nos utimur. Nam jure civili teſtim. in ſcriptis fieri non poteſt per notas aut Zypheras inuſitatas ut cenſent Bar. Bald. Angl. & al i in L. quoties § 1. ff. de hæred. inſtituend. præterquam in caſibus exceptis, veluti in teſtamento militis, ad pias cauſas, &c. de quibus Vaſq. de ſucceſſ. creat. lib. 2. § 15. requiſit. 16. tit. atque l. de privileg. piæ cauſæ, c. 13. Graſſ. Theſaur. com. op. §. teſta. q. 10. *h* L. 1. ff. 1. ſi. Tabul. teſta. Vaſq. d. requiſit. 16. *i* L. ex ea ſcriptura, ff. de teſta. L. fidei commiſſ. § 1. de leg. 3. *k* L. quoniam ind gnum, C. de teſta Molin. in L. 1. §. eodem ff. de verb. ob. n. 8. in fin.

by the sense is unperfect. As for example, the Notary doth write thus, (I make my Wife my, of this my last Will and Testament) leaving out this word (Executor.) In this Case the Error of the Writer ought not to prevail against the Truth of the Testament [l]: For the Law presumeth that more was spoken, though less was Written [m]; much less ought it to be prejudicial to the Testament, where instead of the words omitted, other words of the same sense to such purpose are used and expressed [n]. For example, Suppose that in the Testament it is Written, that the Testator doth bequeath such Lands to such person, to have and to hold, to him and to his Assigns, for evermore. However, in this device there is not any mention of Heirs, without which word an Estate of Inheritance cannot pass, by any Deed or Gift made whiles a Man yet liveth; yet because in Testaments, the Will and the Intent of the Testator is preferred before Formal or Prescript words, an Estate of Inheritance doth thereby pass, as if he had made express mention of his Heirs [o]. Other examples to the same effect are extant in other places of this Book, which to repeat were superfluous.

Concerning the last Question, *viz.* Whether (8) it be necessary that there be Witnesses of a Written Will? this is the answer, That if it be *certain and undoubted*, that the Testament is Written or Subscribed with the Testators own hand; in this case the Testimony of Witnesses is not necessary [p]. But if it be *doubtful*, whether the Testament were Written or Subscribed by the Testator; in this case the Testimony of Witnesses is necessary, to confirm the same to be the Testators own hand [q]. But (9) it is not enough for the Witnesses to say, This is the Testators own hand, for we know his hand [r]; neither is it sufficient (in the opinion of divers) to bring forth other Writings of the known hand of the Testator, and so prove the Will to be Written or Subscribed by the Testator, by comparing such Writings with the Testament [s]. For the Witnesses may be deceived (the Testators hand being easie to be counterfeited,) and therefore Proof by Similitude of hands is not a full Proof [t], saving in those Courts where the Stile or Custom doth approve such Testimony for a full Proof [u], or when the Testament is to be proved in vulgar Form: Nevertheless in this case where it is doubtful, whether the Testator did Write or Subscribe the Testament, if the Witnesses do depose that they did see the Testator Write or Subscribe the Testament, and being learned, know the same to be his hand [x], or else that they did hear the Testator confess, That he had made his Testament, or that the same was in the hands of such a person [y]; or if the Testament were found in the Testators Chest amongst his other Writings. In these Cases the Proof made by comparing of hands, albeit the Testament be to be proved in Form of Law,

l L. Errore, C. de testa.
m D. L. Errore. Ita ut in hoc exemplo non sit necessaria aliqua probatio quòd Scriba erraverat, vel quod testator omnia nuncupaverat, cùm lex ipsa sit loco probationis. Sich. in d. L. Errore. Attamen necesse est probare mulierem istam esse testatoris uxorem, quam vult esse suam executricem. Jas. in d. L. in fin.
n L. quoniam C. de testam.
o Supra eadem part. §. 4.

p Auth. quod sine C. de testa. & DD. ibi. Jo. dilect. de arte testandi. tit. 2. c. 2. in fin. Mascard. de probat. verb. testam. concl. 1352. n. 60, &c.
q Bar. in L. si ita scripsero ff. de cond. & demon. Alex. consil. 76. vol. 3. n. 2, 3. Paris. consil. 19. vol. 3. n. 26. Covar. in c. cum tibi. de testa. exer. n. 5.
r Sichard. in d. Auth. quod sine. Alex. de consil. 76. n. 3, 4. Menoch. de arbitr. Jud. q. lib. 2. cas. 124. n. 22. Afflict. decis. 181. n. 7.
s Sichard. in d. Auth. quod sine. Alex. d. consil. 76. vol. 3. Molin. in addit. ad. Alex. consil. 114. vol. 7. tract. de probat. verb. Alex. d. consil. 67. & consil. 123. vol. 1. n. 5. & demon. quorum opinio magis est communis, teste Grass. Thesaur. com. op. §. Institutio, q. 16. n. 1. & §. testim. q. 16. in fin.
t Bar. & alii in L. admonendi, ff. de jure jur. Afflict. decis. 181. Mascard. comparatio.
u Vestrius prax. cur. Rom. lib. 6. c. 1.
x Sichard. in d. Auth.
y Bar. Imol. & alii in L. si ita scripsero ff. de cond. Grass. Thesaur. com. op. §. Institutio, q. 16. n. 1.

is a full and ſufficient Proof [z]. Or if there be none of theſe helps by likely Circumſtances, yet if on the contrary there be no ſuſpicion of fraud, or fear of ſubornation, I am of their opinion who do hold, that the circumſpect Judge may allow the Proof made by comparing of hands for a full Proof [a]. But then alſo the Writings ſo found in the Teſtators Cheſt, muſt be ſo Written, as it may appear not to be a draught or preparation of a Will, but the Teſtament it ſelf [b]. What if the Teſtator ſhall acknowledge, That his Teſtament is contained in a Schedule or Writing, which he left in the cuſtody of ſuch a Man. Now if that Man bring forth a Schedule, and upon his oath depoſe that to be the ſame Writing which the Teſtator left in his cuſtody, Whether is this a ſufficient Proof of the deceaſed his Will, without any further comparing of hands, yea, or nay? As the caſe is propounded, the Proof is ſufficient without comparing of hands [c]. But if the Teſtator had ſaid, That the Schedule or Will was Written with his own hand, then the aforeſaid Proof is not ſufficient without comparation, whereby it [d] may appear to have been written by the Teſtator; for in ſaying, That the Schedule which he left with ſuch a perſon, containing his Will, is of his own hand writing, it ſeemeth, That the Teſtator did not repoſe ſuch truſt in that Man, as that his Teſtimony alone ſhould ſuffice, unleſs alſo it did appear that the Schedule which ſhould be brought forth, was Written by the Teſtator; which in the former caſe is not neceſſary, where it is referred to the ſole credit of the Witneſs with whom the Writing was left [e].

But what if (10) the Teſtament be found in the Teſtators Cheſt, or ſafely kept amongſt other Writings, which Teſtament is neither Written by the Teſtator, nor by him ſubſcribed, but altogether of another Mans hand, Whether ſhall this Writing prevail as the laſt Will and Teſtament of the deceaſed, or not? It ſhall not [f], unleſs it be proved, that the ſame was Written by the commandment of the Teſtator [g], or unleſs it be ſealed with the Seal of the Teſtator?

z Natta. in Auth. quod ſine. Graſſ. Theſaur. com. op. §. teſtim. q 16. in fin. Maſcard. de probat. ver. teſtim. concluſ. 1352. n. 65.

a Alex. conſil. 174. vol. 7. n. 4, 5. Natta. in d. Auth. quod ſine. & Graſſ. Theſaur. com. op. §. Inſtitutio q. 16. n. 6. Dec. conſil. 215. in fin. Socin. conſil. 162. n. 4. & hanc opinionem non ego falſam cum Molineo, imo communem cum Alex. periculoſam tamen cum Maſcardo, ideoque in arbitrio judicis poſitam eſſe cum Decio ſentio.

b Bar. in d. L. quoties, § 1. ff. de hæred. inſtituend. Maſcard. d. concl. 1352. n. 63. Non tamen opus eſſe puto, obſervari illa requiſita, de quibus in d. Auth. quod ſine; videlicet diei expreſſionem, extenſam ſcriptionem, liberorum nominationem, &c. Quorum ſine obſervatione, nec inter liberos, nec ad pias cauſas cauſas teſtamentum valet, etiamſi conſtet de manu teſtatoris: Nam iſta requiſita inducta ſunt à jure civili, nec ſunt ſublata jure canonico, ut author eſt Everard. Verum autem, inſpecto jure gentium, quo jure nos Angli haud aliter ac Romani milites, liberè fruimur, non eſt neceſſaria vel di ei expreſſio, vel extenſa ſcriptio, &c. Illud ſolùm exigitur, ut conſter ſcripturam manu teſtatoris exaratam fuiſſe, vel ſubſcriptam ſine alia quavis ſolennitate, dum tamen hujuſmodi ſcriptura non ſit præparatio ad teſtandum, ſed ipſa depoſitio, ut aliàs ſupradictum eſt, & infradicendum, part. 7. § 13. in fin. c Alex. conſil. 176. vol. 5. n. 3. Lud. Zunt. pro uxore, fol. 14. n. 88. Hyero. Pant ſmanr. lib. 2. q. 2. n 53. d Aſtrenſ. in l. hæredes palam. ff. de teſta. n. 2. Zunt. & Pantiſſi. ubi ſupra. e L. Theopompus ff. de dote præ. leg. probatur, quod di o unius ſtat. ex voluntate teſtatoris. f Jaſ. in d. Auth. quod ſine, C. de teſta. Jul. Clar. §. teſtim. p. 41. n. 5 ubi dicunt hanc opinionem eſſe communem Menoch. lib. 4. præſ. 17. n. 1. g Jaſ. in d. Auth. Maſcard. de probat. d. concluſ. 1353. n. 6. h C. 2. de fide Inſtr. extr. Et ilcet Decius ibidem teneat contrarium, niſi Sgillationi accedat etiam ſubſcriptio: Quia tamen hæc opinio fundata eſt in ſolennitate juris civilis, nobis jus gentium attententibus, opinor hanc Decii ſententiam non audiendam fore in foro noſtro.

Sect. XXIX. Of the Form of a Nuncupative Teſtament.

1. *Of the Form of Words in a Nuncupative Teſtament.*
2. *Obſcurity and Ambiguity to be avoided.*
3. *Obſcurity, what it is, and how it may be avoided?*
4. *Ambiguity, what, and how it may be avoided?*
5. *The difference betwixt Obſcurity and Ambiguity.*
6. *Wills favorably interpreted.*
7. *In Contracts, Interpretation is to be made againſt the Party.*

IN the making of a Nuncupative Will or Teſtament, this is chiefly to be obſerved, That the Teſtator do name his Executor, and declare his mind by words of mouth, without writing, before Witneſſes [a]. As (1) for any preciſe form of words, none is required [b], neither is it material whether the Teſtator do ſpeak properly or unproperly [c]; ſo that his meaning do appear, as hath been heretofore confirmed by divers examples [d]. But it is not ſufficient for the Teſtator to leave a ſound in the Ears of the Witneſſes, unleſs he do leave ſome underſtanding alſo of his Will and Meaning [e].

And although in Written Teſtaments, it be alſo required that the Words and Sentences be ſuch as thereby the Teſtators meaning may appear [f]; yet more ſpecially it is required in a Nuncupative Teſtament, for more ſupply may be made in Written Teſtaments than can be made in Nuncupative Teſtaments, concerning the Teſtators meaning [g].

Wherefore (1) that the Teſtator may the better perform this thing, and that his meaning may be better underſtood, he muſt as much as he can avoid *Obſcurity* and *Ambiguity* [h].

Obſcurity (3) is avoided by ſpeaking plainly; for an obſcure ſpeech is that which either cannot be underſtood at all, or very hardly, by reaſon of the cloudy darkneſs thereof, or want of the light of plain utterance [i].

Ambiguity (4) is avoided by ſpeaking ſimply and certainly; for an ambiguous ſpeech is that which yieldeth divers ſenſes to the hearer, who remaineth doubtful in whether ſenſe the ſpeaker is to be underſtood [k].

The (5) difference betwixt Obſcurity and Ambiguity is this. *By Obſcurity*, the hearer is made like to him which walketh in a dark place, not knowing where the way lieth; whether on the right hand, or on the left, before him, or behind him; or whether he be in the way, or out of the way. *By Ambiguity*, the hearer is made like unto him, who walking in the light, meeteth with two or three ways, and knoweth not which way to take, nor which of thoſe ways leadeth to that place

[a] § fin inſtit. de teſta. ordin. Auth. hoc inter §. per nuncupationem. C. eodem tit. numerum tamen ſeptenarium teſtium de quo in d. §. non eſſe neceſſarium ſupra diximus.
[b] Molineus, in L. 1. § eodem ff. de verb. ob. n. 8. in fin.
[c] L. quoniam indignum de teſta.
[d] Supra eadem part. §.
[e] L. ſed & ſi §. proſcribere, de Inſtit. action. L. ætate, nihil de inter. action. ff.
[f] Supra §. prox. præceden.
[g] Auth. quod ſine C. de teſta.
[h] De obſcuro & ambiguo. vide Spiegel. Lexic. verb. ambig. & verb. obſcurum.
[i] Spiegel. Lexic. verb. obſcurum. Cagnol. in L. ſemper de reg. jur. ff.
[k] Spiegel. & Cagnol. ubi ſupra.

place whereunto he ought to go [l]: Both of them are to be avoided.

And albeit (6) the Law hath provided favorable Interpretations, to ſuſtain the Teſtament where the Depoſition is obſcure, ambiguous, or uncertain [m], contrary to the (7) nature of Contracts, where he that ſpeaketh obſcurely or ambiguouſly, is ſaid to ſpeak at his own peril, and that ſuch his Speeches are to be taken ſtrongly againſt himſelf [n]: Nevertheleſs how favorable ſoever the Law be towards dead Mens Wills, the Lawyers are not ſo favorable to their Clients; and therefore if it were but to avoid long and coſtly Suits; it is meet that the Teſtator utter his mind, as plainly and certainly as he can.

l Zaſius in L. veteribus ff. de pactis. Spiegel. & Cagnol. ubi ſupra. Fateor tamen alias ab aliis differentias excogitari, & quandoque etiam confundi.

m L. in teſtamentis de reg. jur. ff. & DD. ibid.

n L. veteribus ff. de pactis.

Sect. XXX. Of the Particular Forms of other Teſtaments or laſt Wills.

CConcerning the Forms of Teſtaments priviledged, or not priviledged, or of other kinds of Wills, as of Codicils, or of gifts in caſe of Death, I refer the Reader to thoſe places where ſpecial mention is made of every of them, and of their differences of Forms [a].

And chiefly concerning the Forms of Legacies, I wiſh the Reader to peruſe the manifold Forms of making an Executor: For as I have often ſaid [b], by underſtanding after how many ſorts an Executor may be appointed, it is an eaſie matter to collect how diverſly a Legacy may be left alſo.

a Supra in part. §. 5, 6, 7, &c.

b Supra eadem part. §3, 4. n. 18. cum ſeq.

THE

WHAT PERSON MAY BE EXECUTOR OF A TESTAMENT, Or is capable of a LEGACY.

The Fifth Part.

§ I.

1. *Every one may be Executor which is not forbidden.*
2. *The Teſtator may omit or exclude his own Child, and make others Executors.*
3. *The Teſtator may make Executors either Bondmen or Free.*
4. *Not onely Lay-men, but Clerks alſo may be made Executors.*
5. *Women as well as Men may be Executors.*
6. *Infants as well as thoſe of Full age may be made Executors.*
7. *The Teſtator may make his Executors either known or unknown perſons.*
8. *The Teſtator may appoint Executor either his Creditor or his Debtor.*
9. *The Teſtator may appoint Executors either one perſon, or many.*

IN the Fifth principall Part of this Teſtamentary Treatiſe is declared, what perſons may be appointed Executors, and are capable of a Legacy; and what perſons are incapable of an Executorſhip or Legacy.

Wherein, foraſmuch as the Law doth give liberty to the Teſtator to appoint whom he will to be his Executor [a], and likewiſe to give Legacies to whom he will, certain perſons excepted [b]; this may be delivered for a Rule, That (1) every perſon may be an Executor, and is capable of a Legacy, ſaving ſuch as are forbidden [c]. Now what perſons theſe be which are forbidden, ſhall ſtraightway be ſhewed, after the view of the greatneſs of the Teſtator's liberty in appointing his Executors.

[a] Tit. de hær. inſtit. l. 2. Inſtitut. in princ. Benedict. de Capra. Tract. regul. & ſal. verb executor.
[b] § legati. Inſtit. de lega.
[c] Minſing. in d. tit. de hær. inſtit. in prin. pract. Petr. de Ferrar. in forma libelli ad redden. ration. tutel. § ad executores, n. 1.

Firſt, it is to be underſtood (2) that this liberty of the Teſtator is ſo large and ample, that albeit the Teſtator have Children of his own naturally and lawfully begotten, yet by the Laws and Cuſtoms of this Realm he may appoint others to be his Executors, ſecretly omitting, or openly excluding, his own Children [d].

[d] Bract. de conſuet. & leg. Angl. l. 2. c. 26. Tract. de repub. Angl. l. 3. c. 7. Unde perſpicuum eſt, nullum fere uſum apud nos manere hujuſmodi titulorum juris civilis, viz. de exhæred. &c. liberorum, l. 2. Inſtitut. de lib. & poſthu. hær. inſtituend. vel exhæred. ff. & de inoffic. teſt. ff. Inſtit. &c. una cum pluribus aliis ejuſd. farinæ cum titulis, tum legibus.

Secondly, (3) the Teſtator hath liberty to appoint Executors, not onely thoſe which be Free, but alſo Bondmen or Villains *, either his own villain, or the villain of another [f]. And if the Teſtator do make his own villain Executor, he doth manumit, or deliver his villain from bondage [g]. And if another's villain be made Executor, ſuch villain may as Executor have action againſt his own Lord, in caſe he were indebted to the Teſtator [h]; becauſe he ſhall not recover the debt to his own uſe, but to the uſe of the Teſtator [i].

* Libr. inſtit. tit. de hæred. inſtituend. in prin. Littleton tit. Villenage, fol. 40. Brook Abrid. tit. Villein, n. 68. Et licet jure civili ſervus inſtitui quidem non poteſt executor, ut per Bald. in L. id quod. C de Epiſcopis & cler. n. 3. tamen jure quo nos utimur, inſtitui poſſunt ſervi noſtrates executores, ut per Littleton & Brook ubi ſupra. Quinimo eodem jure civili ſervus conſtitui poteſt nudus executor. Jo. de Can. Tract. de exec. ult. volunt. part. 1. q. 3. n. 47. [f] D. tit. de hæred. inſtit. in prin. [g] Jo. de Platea in d. tit. in prin. [h] Littl. tit. Villenage, fol. 40. Brook tit. Villein, n. 68. [i] Littl. ubi ſupra, & nota, quod non obtinet jus civile, quo ſervus alienus inſtit. acquirat domino. § alien. Inſtit. de hæred. inſtit.

Thirdly, (4) the Teſtator hath liberty to appoint his Executors not onely Lay-men, but Clerks alſo [k].

[k] Imo. etiam religioſos, obtenta licentia, Fitz. tit. execut. n. 47. Brook eod. tit. n. 68. 77.

Fourthly,

Fourthly, (5) the Teſtator may make Executors not onely Men, but alſo Women [l], either ſingle, or married [m]. But when a woman is made ſole Executrix, and ſhe taketh a husband, whether the husband alone may releaſe any debt due to the deceaſed, hath been a great queſtion in former ages amongſt the learned and expert in the laws of this Land, by whom it hath been ſtrongly argued *pro & contra* †: but now at laſt it ſeemeth to be without queſtion, that the releaſe of the husband in ſuch a caſe is good [n].

[l] Covar. in c. tua. de teſta. extr. Et eſt communis opinio. Peckius de teſta. conjug. l. 1. c. 20.

[m] Peckius de t. c. Fitz. & Brook d. tit. Executor.

† Vide relationes Roberti Keilwey inter caſus incert. temporis, fo. 122.

[n] D. Coke l. 5. Relat. in Ruſſels caſe, paulo ante finem. Fitz. Abridg. tit. Executor, n. 23. 30. Brook eod. tit. n. 147. 151. 152. Vide. part. 6. § 3. n. 17.

Fifthly, (6) the Teſtator hath power to appoint Executors not onely perſons of Full age, but alſo Infants [o]; and the act done by the Infant as Executor, as the releaſing of the debt due to the Teſtator, or the ſelling or diſtributing of the Teſtator's goods, is ſaid to be ſufficient in Law [p]. Which is to be underſtood, upon true payment and ſatisfaction of the due to the deceaſed, made to the Executor in minority: for then he may acquit and diſcharge the debtor for ſo much as he doth receive; for therein he doth perform the office and duty of an Executor, which he is inabled to doe, and ſo doing, his act ſhall bind him [q]. But if he ſhall releaſe without ſatisfaction, this act is not according to the office and duty of an Executor; and therefore being without the compaſs of his office and duty, ſhall not bind or bar him from recovery thereof: for if it ſhould, then ſhould it be a *Devaſtavit* [r], and charge the Minor out of his own proper goods, which cannot be by Law: for a child may better his eſtate, but not make it worſe †, by contracting with, or acquitting of another perſon. And here note, by the laws of this Realm every one is accounted Infant untill he be 21 years old *. And yet it ſeemeth that in ſome caſes the Executor ſhall be adjudged to be of full age before he be 21 years old: for if the Teſtator make one his Executor that is in Minority, whereupon adminiſtration is granted to ſome other, to the uſe of the ſaid Executor *durante minore ætate*; in this caſe the adminiſtration doth ceaſe when the Executor is of the age of 17 years [t]. Which is agreeable to the opinion of ſome Civilians, and that opinion confirmed by cuſtom [v]: though others be of a contrary opinion, eſteeming him unfit to manage another's affairs, that is unable to govern his own [x]. Which contrariety nevertheleſs may be reconciled, not onely by the diſtinction of law and cuſtom [y], or by the difference between Acts Judiciall and Extrajudicall [z]; but alſo and eſpecially by the diſtinction of Acts conformable and not conformable to the office of an Executor; whereof the former are holden lawfull, notwithſtanding his minority, and the other of no validity in Law †. But if the Infant be ſo young that he hath no diſ-

[o] Brook Abridg. tit. exec. n. 115. tit. coverture, n. 56.

[p] Brook ubi ſupr. & ſic non recipit juris civilis diſciplina, qua minor 17 annis non admittitur execut.

[q] D. Coke l. 5 Relationum, fol. 27. Ruſſels caſe.

[r] D. Coke d. loco, ubi pluribus aliis non contemnendis nititur argumentis huc tendentibus.

† Namque placuit, meliorem quidem conditionem licere pupillis facere, deteriorem vero non. Inſt. tit. de auct. Tut. in princ.

* Doct. & Stud. l. 1. c. 21. l. 2. c. 28.

[t] D. Coke l. 5. relat. fo. 29. in Princ. caſe.

[v] Conſuet. (inquit Jo. de Canibus) illos admittit, ſicut etiam tolerat eos eſſe ad negotia procurator. Tract. de execut. ult. volun. prima partic. n. 44.

[x] Verior (inquit Oldendorpius) eſt eorum ſententia, qui dicunt minorem 21 annis, majorem tamen 17, ad executionem teſtamenti non admitti. Tract. de ex. ult. volunt. tit. 4.

[y] Jo. de Can. ubi ſupra.

[z] Speculator. tit. de Inſt. edit. § Nunc vero aliqua, n. 79.

† D. Coke l. 5. relat. fo. 27. in Ruſ. caſe.

cretion, (for it is not onely lawfull to make such an one Executor, but also the Child in the Mother's womb,) and unborn at the death of the Testator [q],) in that case the Ordinary, or other to whom the approbation of the Testament appertaineth, after the birth of the child, doth commit the execution of the Will to the Tutor of the child for the child's behoof, untill he be able to execute the same himself; the which Tutor hath authority to deal as Executor untill the child be able to undertake the Executorship [r], that is to say, untill it be of the age of 17 years, as is above said. During which Minority, the Administrator to the child's use cannot sell or alienate any of the goods of the deceased, unless it be upon necessity, as for the paiment of the deceased's debts, or that the goods would otherwise perish †; nor let a lease for a longer term then whileſt the Executor shall be in minority: because having that office for the good and benefit of the child onely, he may not doe any thing to his prejudice [t].

Sixthly, (7) it is lawfull for the Testator not onely to appoint his Known friends and acquaintance his Executors, but also Strangers, and such persons as he did never see [v].

[q] L. placet. ff. de lib. & posthu. quæ lex etsi loquatur de hæred. institut. idem tamen juris vel in executoris constitutione passim ab Anglis observari notorie constat, quicquid dixerit jus civile. Vide Dyer fol. 303, 304.

[r] Quod sine ulla contradictione sæpissime observatur, saltem infra provinciam Eborac.

† D. Coke in Prin. case, l. 5. relat. fo. 29.

[t] Ibidem.

[v] § fin. instit. de hæred. instituend. L. extraneum. C. de test. Vid. infra ead. part. § ut & intell. ut ibi.

Seventhly, (8) it is lawfull for the Testator to constitute and ordain to be his Executor, either that person to whom the Testator is indebted, or that person that is indebted to the Testator. If the Testator make him to whom he is indebted his Executor; as well by the Civil [x] and Ecclesiasticall [y] Laws, as also by the Laws of this Realm, he is in as good case as other creditors of the deceased, and may allow his own debt before other like creditors [z]; and may detain so much of the goods of the deceased in his own hands as his debt doth amount unto [a], (in case he make an Inventory of the deceased's goods [b] according to the Law.) So that albeit it may seem that the action is extinguished in regard of the Testator, yet the debt is still *in esse* in respect of other Creditors [c]. Howbeit an Executor of his own wrong cannot detain the debt due unto him in prejudice of other Creditors [d]. When the Creditor maketh the Debtor his Executor, in this case the debtor proving the Will, the debt is utterly confounded and extinguished by the Executorship; because the Executor being one and the same person in Law with the Testator, he cannot bring an action against himself *. And if two be bound to one in a certain sum of mony, and the creditor maketh the one of them his Executor, this is held for a release in Law of the bond and debt to them both [f]. Again, if the Testator make his debtor and another not indebted his Executors, af-

[x] L. scimus. C. de jur. deliberand. § in computatione.

[y] C. stat. § statuimus. l. 3. pr. constit. Cant.

[z] Plowd. in casu inter Woodward & Patrie. L'abridg. dez cases, fol. 174. n. 3.

[a] Fulb. paral. lib. 1. fo. 44. 6. Inst. part 1. 264. 6. 8 E. 4. 3. 21 E. 4. fol. 2. 12 H. 4. fo. 21. Pl. Com. fo. 176. 545.

[b] D. L scimus. C. de jure deliberand. § in computatione.

[c] D. § In computat. & Fulb. ubi supra.

[d] D. Coke l. 5. Relationum, fo. 32. in Coulters case. * Labridg. dez cases edit. An. Dom. 1599. tit. executors, n. 3. Fulb. ubi supr. fo. 44. 21 E. 4. fol. 3. Pl. Com. fo. 36. [f] Ibid. p. 1. Brook Abridg. tit. executor, pl. 118. 21 E. 4. 81. 11 H. 4. pl. 31.

ter

ter whoſe death they both prove the Will, then that Executor dieth that was indebted, the other who was not indebted ſurviving; the ſurvivor in this caſe ſhall not have an action of debt againſt the Executor of his Co-executor [g]. But what if the partie indebted did not adminiſter as Executor in his life-time? In this caſe likewiſe it ſeemeth the Executor ſurviving hath no action for the recovery of that debt [h]: for that the action was by conſtituting him Executor extinguiſhed and dead, and being once dead can never be revived [i]. But if one that is indebted make his Creditor and another his Executors; the Creditor, if he do not prove the Will nor adminiſter, may have an action againſt him which doth prove the Will [k]; for the debt is not extinguiſhed untill he doth adminiſter as Executor [l]. So that the debt due by the deceaſed is not extinguiſhed by appointing the Creditor an Executor, unleſs he do adminiſter as Executor: but the debt due to the deceaſed is extinguiſhed by appointing the debtor his Executor, though he do not adminiſter; unleſs peradventure it be in prejudice of others, to whom the Teſtator was indebted: for if there be not aſſets or goods ſufficient as well for performance of the deceaſed's Will as the payment of his debts; there the Will muſt reſt unperformed, untill the debts be firſt diſcharged, whether it be in reſpect of goods bequeathed, or debts either expreſly or ſecretly releaſed in the ſame Will [m]. For Legataries may not be preferred before creditors, ſince theſe ſhould ſuffer loſs if they were not ſatisfied; whereas the other ſhould ſuſtain no dammage, onely they ſhould not gain [n].

[g] Labridg. dez caſes, tit. exec. fo. 174. n. 3. 21 H.7.fo.31.contra.

[h] Labridg. & Fulb. ubi ſupra.

[i] Actio ſemel extincta nunquam reviviſcit.

[k] Fulb. ubi ſupra.

[l] Labridg. dez caſes edit. An. Dom. 1599. tit. executors, fol. 174. n. 3.

[m] L. ſcimus. § & ſi præfatam. C. de jure delib. Bract. de legib. Angl. l. 2. c. 26.

[n] Creditores de damno vitando, legatarios de lucro captando, certare pluſquam manifeſtum eſt. Prætect. in d. § & ſi præfatam.

Finally, (9) the Teſtator may appoint one perſon alone, or many: many, I ſay, ſeverall, or many repreſenting one body, as a Colledge, a City, an Univerſity [o].

[o] § unum. inſtit. de hæred. inſtituend.

[p] L. hæred. C. de hæred. inſtit. Minſing. in d. § & unum. Graſſ. Theſaur. com. op. § Inſtitutio, q. 20.

After this view of the greatneſs of the power of the Teſtator in making Executors, let us return to the reſtraint of the Teſtator's liberty, and ſhew what perſons are forbidden to be Executors, or to reap any commodity by a Teſtament or laſt Will.

Of Debtors and Creditors made Executors or Administrators.

IF an Infant of the age of 17 years releaſe a debt, this is void; but if an Infant make the debtor his Executor, this is a good releaſe in law of the Action [a].

[a] Inſt. part 1. fo. 264. b.

If a Feme Executrix take the debtor to husband, this is no releaſe in law, for that would be a wrong to the deceaſed, and in law work a *devaſtavit*, which an act in law ſhall never doe: and ſo adjudged [b]. But if the Teſtator make the wife of one indebted to him his Executrix, it is a releaſe in law, as if ſhe her ſelf were the debtor; but if after the Teſtator's death ſhe do marry with ſuch a debtor, then it's a *devaſtavit* [c]. Alſo if A. and B. be made Executors, the Teſtator being indebted to A. 10 l. and B. being indebted to the Teſtator 10 l. in this caſe the debt of B. to the Teſtator is extinct [d].

[b] M. 30, 31 Eliz. Inſt. part 1. fo. 264. b.

[c] *Office of Executor*, c. 17. S. 1.

[d] 21 H. 7. 31. Pl. Com. fo. 185. Contra *Danby* & *Choke*. 8 E. 4. fo. 3.

Where a Creditor to the Teſtator is made his Executor, he may detain ſo much of the Teſtator's goods, as thereby to ſatisfy himſelf in the firſt place before other Creditors *. Yet this is to be underſtood, where he makes an Inventory of the deceaſed's goods according to law [f]; and that the debt to him owing be of equall degree with the debts to others. For if his Teſtator were indebted to other men by Stat. Judgm. or Recogniſance, and to him whom he maketh Executor onely by Bond or other Specialty; then he cannot firſt pay himſelf: but if there be Aſſets ſufficient to ſatisfie all parties, he may. Pl. Com. fo. 185.

* Pl. Com. *Woodwards* caſ. Abridgment dez caſes, fo. 174. n. 3.

[f] Dict. L. Scimus. § in comput.

If adminiſtration be committed to the Obligor, the ſame doth not extinguiſh the debt; but if the Obligee doth make the Obligor his Executor, the ſame is a releaſe in law of the debt, becauſe it is the act of the Obligee himſelf [g].

[g] C. lib. 8. fo. 135. Sir *Jo. Needhams* caſ.

The father and ſon were joyntly and ſeverally obliged to A. who made the ſon's wife his executrix, and deviſeth to her all his goods after his debts and legacies paid, and dies; the wife adminiſters; the ſon makes his wife alſo executrix and dies; the wife dies inteſtate; adminiſtration of the goods not adminiſtred of the Obligee was committed to F. who ſues the father, who was the ſurviving joint-Obligor: *per Curiam*, the making of the wife of one of the Obligors Executrix, was a ſuſpenſion of the action during ſuch time as the executorſhip continued, as 8 E. 4. fo. 3. And *Nichols* ſaid, that a perſonall action once ſuſpended by the act of the party, as here by the act of the Obligee, in making the wife of one of the Obligors his Executrix, ſhall be extinct for ever: otherwiſe if by the act of law it was averred that the debts and legacies were paid [h]. Therefore when the Obligor made the Executrix of the Obligee his Executrix, and left aſſets, the debt was preſently ſatisfied by way of retainer; and conſequently no new action

[h] T. 12 Jac. C. B. *Fryer* verſ. *Gilding*. Moores rep. fo. 855. n. 1174. Hob. rep. fo. 10. H. 11 Jac. rot. 1990.

action can be had for that debt. Judgement was, *Quod quærens nihil capiat*, &c.

If the Debtee dies inteſtate, and the Ordinary commit adminiſtration to the Debtor; yet it ſhall be aſſets in his hands as to ſatisfie debts, becauſe the Ordinary hath no power to diſcharge the debt [i].

If the Debtee makes the Debtor his Executor, it's not an abſolute diſcharge of the debt, for the debt remains as aſſets in the hands of the Debtor Executor; and is *quaſi* a releaſe in law, becauſe he cannot be ſued, but it is a meer ſuſpenſion of the action [k].

[i] Rolls abridgment, tit. executor, lit. 9. T. 7 Jac. B. R.

[k] M. 9 Car. rot. 373. *Dorcheſter* verſ. *Webb.* Crook part 1. fo. 373. 8 E. 4. 3. 20 E. 4. 17. 21 E. 4. 81. 21 H. 7. 31. 11 H. 7. 4. 11 H. 4. 83. C. lib. 8. fo. 136. Sir *Jo. Needhams* caſe.

Where the Feme Debtee takes the Debtor to husband, or if a man debtee takes the debtor to wife, it's a releaſe in law, becauſe they may not be ſued: but where the Executor of the debtor is made Executor to the debtee, he hath nothing thereby in his own right, but is onely to uſe an action in the right of another [m].

[m] M. 9 Car. rot. 373. *Dorcheſter* verſ. *Webb.* Crook part 1. fo. 373.

§. II. Of an Heretick.

1. *An Heretick cannot be Executor.*
2. *Whether an Heretick may be Executor in a military teſtament.*
3. *What if the Heretick do reclaim his Hereſie.*

AN (1) Heretick cannot be Executor, neither is he capable of a Legacy [a]. And ſo odious is the crime of Hereſie, that albeit the party be not yet condemned of Hereſie, nevertheleſſe perſevering in his Hereſie, he is not to be admitted [b], no not (2) in a military Teſtament [c]: howſoever a Souldier hath more liberty in making an Executor then another [d].

[a] L. Ariani. C. de hæretic. Sichard. in Rub. de hæred. inſtit. C. n. 5. Minſing. in tit. de hær. inſtit. l. 2. Inſtitu. in prin.

[b] Vaſq. de ſucceſſ. progreſſ. l. 1. § 2. n. 2. [c] L. ult. C. de hæret. [d] Supra 1. part. § 14.

And albeit (3) he that is named Executor do repent, and reclaim his Hereſie; yet being an Heretick either at the time of the making of the Teſtament, or at the time of the death of the Teſtator, or at the time when he undertakes the Executorſhip, he is excluded *.

For this is perpetuall, that if any perſon be incapable either when the Teſtament is made, or when the Teſtator dieth, or when he taketh upon him the Executorſhip, it is as if he were always incapable [f]: but it hindreth not if he be incapable at other times [g]. Neither doth it hinder the Legatary, though he be incapable of the legacy at the ma-

* § Extraneis. Inſtit. de hæred. qual. & differentia.

[f] D. § in extraneis. L. ſi alienum. § 1. ff. de hæred. inſtit. Sichar. in Rub. de teſta. C. in fin. Graſſ. Theſaur. com. op. § Inſtit. q. 28. [g] d. § in extraneis. L. ſed etſi. § ſolemus. ff. de hæred. inſtit.

king

king of the Teſtament, ſo that he be capable thereof at the time of the Teſtator's death [h], (as appeareth more at large hereafter [i].) The reaſon of the difference is, becauſe the Legacy dependeth of another act; that is to ſay, of the Teſtament, from whence it receiveth its power and virtue: but the Teſtament or appointment of the Executor doth not depend of another act, whereby it may receive either life or ſtrength [k].

[h] Bar. in L. non oport. ff. de leg. 2. Peckius Tract. de teſta. conju. l. 4. c. 31. Graſſ. Theſaur. com. op. § Inſtitutio, q. 18.
[i] Infra part. 7. § 19. Fulb. ſo. 36. l. 1. paral.
[k] Peckius d. c. 31.

And yet in ſome caſes it ſeemeth, that albeit the Executor be uncapable at the time of making the Will, it hindereth not, if the ſame incapacity do ceaſe by the death of the Teſtator; whereof we ſhall have occaſion to ſpeak more at large hereafter [l].

[l] Vide infra part. 7. § 19.

§ III. Of an Apoſtata.

AN Apoſtata alſo is incapable of an Executorſhip, or Legacy [a]. What an Apoſtata is, and how many kinds of Apoſtacie there be, I have elſewhere declared [b].

That which is here ſpoken is meant of Apoſtacie properly ſo called, that is to ſay, of back-ſtarting from the Chriſtian Faith [c]: to whom I might joyn alſo Anabaptiſts, for they are alſo incapable of Executorſhips and Legacies [d].

[a] L. hi qui ſecundum. § de Apoſtata.
[b] Supra part. 2. § 15.
[c] Bar. in Rub. de Apoſtata. C.
[d] L. ult. de ſacr. baptiſ. reit. C. Minſing. in d. tit. de hæred. inſtit. l. 2. Inſtit. in prin.

§ IV. Of Traitours and Felons.

WHoſoever is convicted of Treaſon or Felony, as he cannot make a Teſtament or laſt Will, as is before confirmed [a], no more is he capable of any thing diſpoſed by Teſtament or laſt Will [b]. But if a man, being attainted of Felony, be admitted to his clergy, I ſuppoſe that he may lawfully be an Executor [c].

[a] Supra §§ 12, 13. part. 3.
[b] Nam cum ſit damnatus ad mortem naturalem, mortuo æquiparatur, & ſic non poteſt inſtitui. Bar. in progreſſ. l. 1. § 2. n. 13. L. qui ultimo. ff. de pœnis. & eſt com. op. Graſſ. § inſtitut. q. 5. Vaſq. de ſucceſſ.
[c] Labridg. dez caſes edit. An. Dom. 1599. tit. exec. fol. 180. n. 13.

By the law of *England*, a perſon outlawed or attainted for felony may be Executor, becauſe he hath the goods not to his own uſe, but in another's right: as it was held *per Curiam* P. 1 Car. C. B. in Sir *Upwell Carones* caſe [d].

[d] Crook part 1. ſo. 9.

And ſuch Executor may maintain a writ of error to reverſe a Judgment given againſt the Teſtator, as it was adjudged 33 Eliz. B. R *.

* *Office of Executor*, ſo. 24. T. 30 Eliz. B. R. *Marſhes* caſ. Leon. fo. 325.

§ V.

§ V. Of him that is Outlawed.

HE that is Outlawed is out of the protection of the Prince, and all his goods are forfeited, and he is deſtitute of all the aid of the Laws of this Realm [a]: And therefore ſo long as he ſtandeth in that caſe, he is not to be admitted to the Executorſhip, nor can ſue for his legacy [b]; except it be in ſuch caſes as he may make his Teſtament, whereof mention is made before [c].

[a] Supr. part. 2. § 21.

[b] Fitzh. Abridg. tit. adminiſtr. n. 3. Sed non exiſtimo utlegatum penitus incapacem reddi, utpote quem relegato verius quam deportato comparandum putem: (nam & relegati bona quandoque publicantur:) ſed quia non habet perſonam ſtandi in judicio, utlegatus non eſt audiendus in judicio durante utlegatione. [c] Supr. d. part. 2. § 21.

Howbeit though the Ordinary do not admit him, yet if he ſhall adminiſter as Executor, becauſe it is to the uſe of another, it is holden for good, by the opinion of thoſe who do alſo hold that a perſon outlawed may be an Executor, as well as he may be an Atturney for another, or *prochein amy* [d], &c. Which opinion ſeemeth to be agreeable to law: for an outlawed perſon in an action perſonall doth not much differ from a villain, of whom there is no doubt but that he may be Executor *. For though the Lord may lawfully enter unto and ſeiſe upon all the lands and goods belonging to his villain, and thereby take and enjoy them to his own uſe [f]: yet thoſe goods which the villain hath as Executor, his Lord may not take from him; and if he do, his villain may bring an action againſt him, and recover both goods and dammages [g]. And the reaſon is, becauſe that which the villain hath, he hath it not to his own uſe, but to the uſe of the Teſtator, and it is to be imployed towards the payment of his debts and legacies, and other godly uſes [h]. Which reaſon doth hold as well where a perſon outlawed, as where a villain is made Executor, (*viz.* to the uſe of another.) And therefore, the reaſon being one in either caſe, the Law muſt be one in both caſes. Nevertheleſs if the Teſtator by his Will (as commonly Teſtators do) bequeath the reſidue of his goods, or at leaſt ſome Legacie, to his Executor, being an outlawed perſon, the ſame is forfeited and confiſcate by force of the Outlawry [i]. Unleſs the Outlawry happen to be pardoned; wherein notwithſtanding the words of the pardon ought very diligently to be conſidered [k].

[d] L'abridg. des caſes, d. tit. exec. fo. 179.

* V. ſupra 2. part. § 7. Brook Abridg. tit. Villenage, n. 73.

[f] Littlet. tit. Villenage.

[g] Supra part. 2. § 7. n. 18. Brook Abridg. tit. Villenage, n. 68.

[h] C. Statutum. § nullus. de teſta. l. 3. provinc. conſtit. Cant.

[i] Doct. & Stud. L. 2. c. 3. & lib. 1. c. 6. D. Coke lib. 3. relat. f. 3. & l. 4. f. 95.

[k] Dom. Coke l. 5. relationum, fo. 49. in *Wirrals* caſe.

A perſon Outlawed may be an Executor to others, and may diſpoſe of the goods which he hath as Executor to others, by Will, and make Executors of them: and ſo it is of Villains, Monks and Friars. And ſuch Executors may maintain a writ of error to reverſe a judgment given againſt their Teſtator, as it was adjudged M. 33 Eliz. in B. R.

If an Executor or Administrator sueth any action, Utlary in the plaintiff shall not disable him, because the suit is *en auter droit*, and not in his own. 12 E. 4. fol. 12. Institut. part 1. fol. 128.

It's no plea for the Administrator to say that the intestate died outlawed; for the Executor or Administrator may have divers things which are not forfeitable to the King. As if the testator had mortgaged his lands upon Condition, that if the mortgagee pay not at such a day to him, his heirs or executors, 100 l. that then it shall be lawful for him to enter; and after, and before the day, the testator is outlawed, and makes his Executors, and dies; and at the day the mortgagee pays the mony to the Executors: that is assets, and not forfeited to the King. So it is if tenant for life of a rent be outlawed, and the rent arrere, makes his Executors and dies; this arrerage is due to the Executors, and is assets, and not forfeited. A man Outlawed may make an Executor, and this Executor may have a writ of Error to reverse the Utlary. M. 20 Jac. *Bullen* verſ. *Gervis*. Huttons rep. fo. 53. 8 E. 4. 6. 21 E. 3. 5. 36 H. 6. 27. T. 37 Eliz. rot. 2954. *Woolley* verſ. *Bradwell*.

A man outlawed in a personall action may make Executors, for he may have debts upon simple contract which are not forfeited to the King; and for the same reason administration of such a man's goods may be granted. M. 43, 44 Eliz. B. R. *inter Shaw & Cattreſs, per Curiam*. Roll. abridg. tit. executor, lit. N.

If an exigent for felony be awarded against a man, whereby he loses all his goods, yet he may make Executors to reverse it, for there he is not attainted. So administration of such a man's goods may be granted. C. lib. 5. fo. 111. a. M. 33, 34 Eliz. B. R. in *Marſhes* caſ. 18 H. 7. B.R. *Eatons* case.

§ VI. Of an Excommunicate person.

ALbeit an Excommunicate person may be appointed Executor, and is capable of a Legacy [a]; yet so long as he standeth in the sentence of Excommunication, he is not to be admitted by the Ordinary, nor can commence any suit for his Legacy [b].

[a] Phil. Franc. in Rub. de testa. l. 6. n. 32. quæ sententia communiter approbatur, ait Graff. Thesaur. com. op. § Institutio. q. 4. Bald. in L. id quod pauperibus. C. de Episcopis & cler. n. 6.

[b] C. intellex imus. de judic. c. post cessionem. de probac. extr.

If Bailifs and Commons, or any Corporation aggregate of many, bring an action Excommengement in, the Bailifs shall not disable them, for that they sue and answer by Atturney: otherwise it is of a sole Corporation [c]. But if Executors or Administrators be excommunicated, they may be disabled, because they which converse with a person excommunicate are excommunicate also [d].

[c] Instit. part 1. fo. 134. a.

[d] Bracton lib. 5. fo. 426.

If

If a Biſhop be def. an Excommunication by the ſame Biſhop againſt the pl. ſhall not diſable him; and it ſhall be intended for the ſame cauſe, if another be not ſhewed *.

* 9 H. 7. 21. 3 H. 4. 3. 5 E. 3. 8. 28 E. 3. 97.

§ VII. Of Baſtards.

1. *Three ſorts of Baſtards.*
2. *Inceſtuous and adulterous Baſtards are incapable of all teſtamentary benefit.*
3. *Divers extenſions of this former concluſion.*
4. *Divers limitations of the ſame concluſion.*
5. *Difference betwixt the Laws Eccleſiaſticall and the Civill Law, about the alimentation and nouriſhment of children begotten in adultery and inceſt.*
6. *Of the Laws and Statutes of this Realm concerning Baſtards.*
7. *Of Baſtards begotten betwixt ſingle perſons.*
8. *Whether the Legacy left unto the Baſtard be preſumed to be left for his alimentation or relief.*

OF Baſtards or children begotten out of matrimony (1) there be divers ſorts. Some are begotten and born in ſimple Fornication; that is to ſay, of carnall copulation between ſingle perſons, ſuch as at the time of the conception or birth of the child may be married together [a]. Some are begotten in Adultery; that is to ſay, of ſuch parents as, being both, or the one of them, married to ſome other at the time of the birth and conception of the child, cannot then marry together themſelves [b]. Some again are begotten in Inceſt; that is to ſay, betwixt ſuch perſons as are prohibited to marry by reaſon of Conſanguinity or Affinity [c].

[a] Covar. Tract. de matrimon. 2. par. c. 8. § 4. Jul. Clar. l. 5. § fornicatio.

[b] Covar. in d. c. 8. § 5. Jul. Clar. § adulter.

[c] Covar. in d. c. 8. § 5. & 6. Jul. Clar. § inceſt.

Baſtards (2) begotten and born in Adultery or Inceſt are not capable of any benefit by the Teſtament or laſt Will of their inceſtuous or adulterous parents [d]. Which Concluſion is accompanied with no ſmall train of Ampliations and Limitations *: of which company theſe are not the meaneſt.

[d] Auth. ex complex. C. de inceſt. nup. & DD. ibid. Covar. de ſponſal. 2. parr. c. 8. § 4. Graſſ. Theſaur. com. op. § Inſtitutio, q. 7. * Petr. Duen. tract. reg. & fal. verb. filius. ubi tradit regulam 14 ampliat. & 11 limitat. illuſtratam.

The firſt (3) Ampliation is, That albeit the inceſtuous or adulterous father do name another perſon to be his Executor, to whom he giveth the reſidue of his goods, willing him to reſtore the ſame goods to his inceſtuous and adulterous child; this diſpoſition is void in reſpect of the Baſtard [f]: neither is the Executor bound to reſtore the ſame, but may retain the ſame to himſelf [g]. For whereof any perſon is not capable directly or by himſelf, he is not capable thereof indirectly or by another [h]. Yet I deny it not, but the Executor may of his own liberality give any goods to the baſtard, though not as the gift or goods of the father [i].

[f] Barth. & Cæpol. Cautela 38. verb. quinta.

[g] Covar. de ſpon. 2. part. § 5. n. 7.

[h] Duen. verb. filius. reg. 366.

[i] Cæpol. ubi ſupra. Jo. Dilect. de arte teſtandi, tit. 1. cautela 14. n. 8. Covar. ubi ſupra.

The second Ampliation is, That albeit the father should appoint his incestuous or adulterous child his Executor, willing him to bestow his goods on such a person, who of likelihood would never demand the same; as if he should will his Executor to give his goods to the Emperour, or to the *Turk*, if he should in person come into *England* to receive the same; this is but a fraudulent cautele, whereby the Executor might have some colour still to retain the same in his own hands [k]. And therefore by reason of this fraud the disposition is void, at least so far as it doth respect the benefit of the Executor [l].

[k] Alex. in L. cogi. § hi qui solidi. ad Trebel. ff. Cæpol. cautela 38. Jo. Dilect. de arte testandi, de cautela 14. [l] Bald. consil. 399. vol. 2. Imol. in L. in tempus. de hæred. instit. ff. & Dilect. & Cæpol. ubi supra.

The third Ampliation is, That even he which is begotten and born in Adultery, much more he that is begotten and born in Incest, is not onely incapable in respect of his Father's Testament, but is also excluded from all Testamentary benefit by his Mother [m].

[m] Covar. epitom. de sponsa. 2. part. c. 8. n. 15.

The fourth Ampliation is, That the deposition is void *ipso jure* which is made in favour of or for the benefit of incestuous and adulterous Bastards [n].

[n] Duen. d. reg. 366. ampliat. 4.

The fifth Ampliation is, That although the incestuous or adulterous bastard be possessed of the thing to him bequeathed; yet he cannot retain or prescribe the same by that title [o].

[o] Bald. in L. id quod pauperib. C. de episcopis & cler. per glos. in L. nem. ff de usu c. Duen. d. reg. 366. amp. 5.

The sixth Ampliation is, That the adulterous, and especially the incestuous, Bastard is excluded, not onely by the Civill and Ecclesiasticall Laws, but also by the Law of God [p]. But whether this ampliation be true or not, I leave to the consideration of the reverend Divines. Divers other ampliations also there be of this conclusion [q], which I omit, because they seem to repugn the Laws of this Realm. Now to the Limitations.

[p] Aug. ut habet 35. q. 7. c. quid est. Duen. d. reg. ampliat. 2. [q] De quibus Duen. d. reg. 366. Bart. Cæpol. cautela 38. & Jo. Dilect. cautela 14.

The (4) Limitations of the former conclusion are these. First, These incestuous and adulterous Bastards may be Executors unto any other person saving unto their naturall parents; and are likewise capable of any Legacy or devise bequeathed unto them by any other saving by their own parents [r]. Even unto their incestuous or adulterous brethren they may be Executors, or receive any other testamentary benefit from them †.

[r] Gloss. in Authen. quib. mod. na. effic. sui. § fin. Clar. § testa. q. 31. n. 4. Panor. in c. cum haberet. De eo qui dux. in matrimo. quam pol. extr. limit. 10. Afflict. decis. 96. † Duen. verb. filius. reg. 366.

The second Limitation is, when they are appointed nude Executors [s], that is to say, when they do not reap any commodity by the Testament [v]; for then they may be Executors even unto their own naturall parents.

[s] Simo de Prætis de Interp. ult. vol. l. 5. f. 17. n. 27. Nec obstat quod dicitur, per incapacem nihil posse capi; quia attento jure Can. spurius etiam incestuosus non est omnino incapax, utpote cui alimenta licitum est relinquere. Duen. d. reg. 366. limitac. 9. verb. filius. [v] Jo. de Athon. in legatin. libert. de executor. test.

Thirdly,

Thirdly, By the Laws Eccleſiaſticall they are alſo capable of ſo much of that which is bequeathed unto them by their inceſtuous and adulterous parents, as will ſuffice for their competent alimentation or relief [x]; that is to ſay, for their food, cloathing, lodging, and other meet and convenient neceſſaries [y], according to the wealth and ability of the parents [a]. And although (5) the Civill Law, in deteſtation of this hainous ſin of inceſt and adultery, did deprive this inceſtuous and adulterous iſſue of the hope of all teſtamentary benefit, though it were left for, and in the name of, alimentation or needfull relief [b]; the rather by this means to reſtrain the unbridled luſts of ſome, and to preſerve the chaſtity of others [c]: nevertheleſs, foraſmuch as Nature hath taught all creatures to provide for their young, ſo that the very brute beaſts have a naturall care to bring up whatſoever they bring forth [d]; ſeeing alſo in equity the poor infants ought not to be puniſhed (at leaſt not to periſh for want of food) by occaſion of their fathers fault, whereof they are altogether faultleſs *; therefore the Eccleſiaſticall Law, whereby not onely adulterous [f], but inceſtuous [g] iſſue alſo, is made capable of ſo much as is ſufficient for needfull and convenient ſuſtentation, hath prevailed againſt the rigour of the Civill Law, and is to be obſerved, eſpecially in the Eccleſiaſticall Court [h], as more agreeable to Nature, Equity, and Humanity.

[x] C. cum haberet, de eo qui dux. in ux. quam poll. per adult.
[y] L. legatis. ff. de alimen. leg. Cætera quæ ad diſciplinam pertinent, legato alimentorum non continentur, niſi aliud ſenſiſſe teſtatorem probetur. L. niſi. eod. tit.
[a] d. c. cum haberet, in fin. Sed neque pro neceſſitate tantum, (ut volunt quidam) ſed etiam ad decentiam, conſtituenda ſunt alimenta, ſi modo facultates ſuppetant. Gab. libro 6. com. concluſ. tit. de alimen. concl. 1. n. 31. Menoch. lib. 4. preſum. 157. n. 21.
[b] D. Auth. ex complex. C. de inceſt. nup.
[c] L. iſti quidem. ff. de eo quod met. cauſ. in fin. & §. fin. Inſtit. de noxal. action.
[d] Cic. lib. 1. offic. L. 1. § 1. ff. de Juſtic. & jur.
* Deuteronom. cap. 24. verſ. 16. Ezech. cap. 18. verſ. 20. L. Sancimus. C. de pœnis. L. ſi pœna. eod. tit. diſt. 56.
[f] Text. in d. c. cum haberet.
[g] Dec. in c. in præſentia. de probac. extr. n. 39. Gabr. ubi ſupra, n. 5. quæ opinio communis eſt, contra Bald. in d. Auth. ex complexu.
[h] Idem juris eſt in terris Imperii. Glaſ. & Panor. in d. c. cum haberet. Bar. in d. Auth. ex complexu. Deciſ. Neap. 164. n. 2. Dec. ubi ſupra. Duen. filius. reg. 367.

Wherefore if the Teſtator ſhall bequeath a competent portion to his baſe daughter, for her preferment in marriage, the ſame is due and recoverable in the Eccleſiaſticall Court: but if the ſum bequeathed be exceſſive, then is it to be moderated *Arbitrio boni viri*, and to be reduced unto a convenient portion *.

* Simo de Prætis de interpr. ult. volun. l. 4. dub. 12. f. 204. & 198.

And in this reſpect (6) the Laws and Statutes of this Realm, in providing as well for the convenient relief and keeping of poor and miſerable children, begotten and born out of lawfull matrimony, at the charges of the reputed father and mother [i], without diſtinction whether ſuch infants were begotten in Inceſt and Adultery, or Fornication [k], as for the puniſhment of the mother and reputed father of ſuch unlawfull iſſue, are worthily commended; although in reſpect of the next limitation following, they may ſeem not altogether ſo worthy commendation.

[i] Stat. Eliz. an. 18. c. 3.
[k] Ubi enim lex non diſtinguit, nec nos diſtinguere debemus. L. de precio. ff. de pub. in rem action.

The fourth Limitation is grounded on the Laws of this Realm, which do permit every man, both by deed made and executed during their lives [l], and alſo by their laſt Wills and Teſtaments to be executed after their deaths [m]; to give and to deviſe unto any their Baſtards, without diſtinction, all their Lands, Tenements or Hereditaments, without reſtraint; at the leaſt more then will ſuffice for their ſuſtenta-

[l] Perkin. tit. graunt, f. 11. Bract. l. 2. c. 7.
[m] Perkins tit. deviſe, fol. 98.

tion, and much more then they are worthy of. Which thing cannot but redound to the great prejudice of right heirs; considering the danger whereunto lawfull children are subject, and which they do many times sustain, through the forcible flatteries of vile dissembling Harlots, no less void of all modesty, then full fraught with all kind of subtilty, with whose sweet poison and pleasant sting many men are so charmed and inchanted [n], that they have neither power to hearken to the just petitions of a vertuous wife, praying and craving for her children, nor grace to deny the unjust demands of a vicious and a shameless whore, prating and grating for her bastards: never remembring that, when *Sarah* said to *Abraham*, *Cast out this bond-woman and her son, for the son of this bond-woman shall not be heir with my son Isaac*; *Abraham*, by the commandment of God, hearkened to the voice of *Sarah* [o]: neither once regarding (that which divers have diligently noted) that the brood of bastards are commonly infected with the Leprosy of the Sires disease [p]; and being encouraged with the example and pattern of their Fathers filthiness, they are not onely prone to follow their sinfull steps [q], but do sometimes exceed both them and others in all kind of wickedness.

[n] Videas c. 5. Prov. Solom.

[o] Gen. c. 21.

[p] C. si gens Anglorum, & ibi Præpos. distinct. 56. Hinc est (ait Peckius) quod Sodomitarum una cum parentibus parvulos etiam cœlesti igne consumpsit Dominus, nempe quod prospexerat parvulos hos idem flagitium admissuros. Pec. in c. non decet. de reg. jur. 6. [q] Mali corvi malum ovum; & metuenda sunt paterni criminis exempla. L. quisquis. C. ad L. Jul. majest. § 1.

The fifth Limitation is, in the Bastards of Kings and Princes: for a King may, *ex plenitudine potestatis*, make his unlawfull issue capable of whatsoever by Will devisable he doth give or bequeath unto him [r].

[r] Boer Decis. 127. n. 17. Duen. d. reg. 366. lim. 7.

The sixth Limitation is this, The adulterous Grandfather may bequeath any thing to the lawfull children of his own unlawfull sons or daughters, or make them his Executors †; but so cannot the incestuous Grandfather [t].

† Jas. in L. hæreditas. C. de his quibus ut indig. n. 7. & 8. Cui opinioni locum concederem, etiamsi hic avus habeat legitimos filios; cum apud nos nulla sit necessitas instituendi suos, ut supra eod. part. § 1. [t] Bal. in L. siquis incestus. C. de incest. nup. Covar. in d. c. 8. de spons. 2. part. § 5. n. 13.

The seventh Limitation is this, That the Testator may bequeath unto his incestuous or adulterous daughter a competent portion for her dowry, or preferment in marriage: for this is accounted all one as if he did bequeath it unto her for her alimentation [v].

[v] Panor. in d. c. cum haberet, n. 5. Bar. in d. Auth. ex complexu. quæ conclusio ampliatur per Petr. Duen. verb. filius, reg. 367. ampl. 3.

The eighth Limitation is this, That an Executor may make the Testator's bastard his Executor [x].

[x] Bar. in L. si his. ff. de vulg. sub. Bald. in L. eam qua. C. de fideicommis. n. 4. Clar. § testium, q. 31. Intellige tamen, nisi conjecturæ intervenerint ex quibus fraus præsumatur. Grass. § Institutio, q. 7. n. 13.

The

The ninth Limitation is, when the adulterous parents do ſolemnize lawfull matrimony together before the birth of the child [y]. For example, a married man doth beget a ſingle woman with child, (for this is adulterie by the Laws Eccleſiaſticall of this Realm [z], although by the Civill Law it is but fornication [a],) immediately after his wife dieth, after whoſe death he marrieth the woman, (for ſo he may [b],) after the marriage the child is born: in this caſe the child is not onely capable of any Teſtamentary benefit, but is reputed a lawfull child, and not a baſtard [c], as heretofore hath been diſputed more fully [d].

[y] Præpoſ. in c. tanta vis. Qui filii ſunt legitimi extra. n. 10. Card. eod. c. n. 17. Melc. Klir. Tract. de cauſ. matrim. fo. 8. 86.

[z] Card. Præpoſ. & alii, in d. c. tanta vis. Kling. ubi ſupra, c. nem o, 32. q. 4. Pa.

nor. in c. tranſmiſſa. de eo qui cog. conſan. ux. extr. Clar. § adulterium, n. 2. inter liberos. ff. ead. Clar. ubi ſupra. [b] Niſi præter copulam, mortis machinatio interveniſſet, vel fides data fuiſſet; quia tunc non valet inter eos matrimonium jure can. c. ſuper hoc. c ſignificaſti. de eo qui dux. in matr. quam pol. per adul. extr. Sed an diſſolvi poſſint hodie nuptiæ hujuſmodi, multum dubito, occaſione ſtatuti H. 8. an. 32. c. 38. [c] D. c. tanta vis. & DD. ibidem. [d] Supra part. 4. § 15.

[a] L. 1. C. de adul. L.

The tenth Limitation is, whenas the Teſtator doth bequeath to his baſe child a greater legacy then will ſuffice for his alimentation, in recompence of ſome merit or deſert at the Teſtator's hand; for then the depoſition is good in Law †.

† Tiraquel. in reperit. L. ſi unquam. C de revoc. donac. verb. donatione largitur, n. 21.

Concerning (7) thoſe baſtards which are begotten of ſingle perſons, ſuch (I mean) as may lawfully marry together, then in caſe the mother were a Maid, or an honeſt Widow, immediately before ſuch unlawfull copulation, and conception of the child, this kind of fornication is termed *Stuprum* *; and this kind of baſtard ſeemeth to be in the ſame caſe as if he had been begotten in adultery.

* L. inter liberos. L. ſtuprum. ff. de adul.

If the mother were an Harlot before the conception of the child, howſoever, by the Civill Law, ſuch a Baſtard is not incapable of any Teſtamentary benefit [f]; yet foraſmuch as by the Laws Eccleſiaſticall [g] and Statutes of this Realm [h] ſuch copulation is condemned as unlawfull, and to be puniſhed as ungodly; I ſuppoſe that this kind of baſtard is no more capable of an Executorſhip or Legacy, then if the mother had been honeſt before [i]: eſpecially if the mother were a common harlot, the Teſtator nevertheleſs eſteeming her to be clear from pollution with any other, and himſelf onely to be the undoubted father of the child, whom he doth make his Executor, or to whom he doth bequeath any Legacy by the name of his child; whenas indeed he is not the certain father of the child, the mother having proſtituted her ſelf to the filthineſs of others alſo. For in this caſe, even by the Civill Law, the Baſtard cannot be Executor, nor obtain the Legacy [k]; if not by occaſion of the father's crime, yet by reaſon of the Teſtator's errour and folly, who of all likelihood would never have made that child Executor, nor have ſhewed himſelf ſo good a father, if he had known the bad conditions of the mother. Where it is ſaid, that the parents may bequeath ſo much to their Baſtards as will ſuffice for their alimentation or relief, what kind of Baſtards ſoever they be without diſtinction; it may be demanded, not impertinently nor unprofitably, What (8) if the Teſtator do ſimply bequeath a ſum of money, or ſome other thing, to his unlawfull child, not making any mention that he doth bequeath the ſame.

[f] Covar. de ſponſal. 2. part. c. 8. § 5. n. 15, 16, 17.

[g] C. nemo. 32. q. 4. Panor. in Rub. de adul. extra.

[h] Stat. Eliz. an. 18. c. 13.

[i] Videas Covar. in. d. § 5. adde Paleot. tract. de nothis & ſpur. c. 41. Item Caſ. in L. ſi quæ illuſtris. Ad. S. C. orfri. C. n. 13. Dec. conſ. 305. n. 5. in fin.

[k] Bald. in L. quiſquis. ad L. Jul. C. de adult. Graſſ. Theſaur. com. op. § inſtitutio, q. 7. n. 10. & infr. part. 7. § 5.

ſame for the child's relief or alimentation? whether in this caſe is it to be preſumed that the father did mean it for the child's alimentation or no? But if he did ſo mean, the Legacy is good; otherwiſe it is void. Briefly, howſoever in this matter all men are not of one mind, I do rather ſubſcribe to their opinion who do hold the affirmative [l].

[l] Aymo, Gravett. conſil. 219. n. 8. Menoch. de Arb. jud. lib. 2. caſ. 169. n. 8. Simo de Prætis de Interp. ultim. vol. lib. 3. fol. 10. n. 7. Tiraq. in rep. L. ſi unquam. C. de revoc. don. verb. donatione largitur, n. 63. Caſtrenſ. conſ. 5. vol. 1. n. 5. Colerus, tract. de aliment. lib. 3. cap. 13. n. 3.

A baſtard having gotten a name by reputation, may purchaſe by his reputed name to him and his heirs, although he can have no heir but of his body [m].

[m] 39 E. 3. 11. 24. 17 E. 3. 42. 35 Aſſ. 13. 41 E. 3. 19. C. lib. 6. fo. 65. Sr *Moyle Finches* caſe.

A leaſe is made to B. for life, the remainder to the eldeſt iſſue male of B. and the heirs males of his body; B. hath iſſue a baſtard ſon: he ſhall not take the remainder, becauſe he is not his iſſue; for *qui ex damnato coitu naſcuntur inter liberos non computantur:* and he cannot have a name of reputation as ſoon as he is born [n].

[n] *So it was reſolved* M. 38 and 39 Eliz. Inſt. part. 1. fo. 3. b.

By the Stat. 31 E. 3. 21 H. 8. adminiſtration ought to be granted to the next of bloud; the Ordinary cannot grant it to the baſtard of the inteſtate [o].

[o] H. 40 Eliz. *Portmans* caſ. adjudged accordingly.

A baſtard cannot be a Prieſt or Chaplain [p].

[p] 11 H. 4. 8.

The Lord *Powes* conveyed lands holden *in Capite* to one *Gray* his baſtard in remainder after his death; the Lord *Powes* died: it was held by *Dyer* and *Saunders* Juſtices, that the baſtard ſhould not ſue livery for the 3. part, becauſe the Stat. of 32 and 34 H. 8. ſpeak of lawfull generation [q].

[q] 14 Eliz. Sen'or *Powes* caſ. Dy. fo. 313. M. 18 Eliz. Dy. 345. *Thorntons* caſ. 13 Eliz. Dy. fo. 296.

A. covenants to ſtand ſeiſed to the uſe of himſelf for life, the remainder to R. W. his baſtard ſon in tail; no uſe is raiſed to the baſtard, becauſe there is no valuable conſideration: for naturall affection is not a ſufficient conſideration; for that he is a ſtranger in law, although he be a ſon in nature [r].

[r] M. 23 Eliz. Dy. 374. *Worſtyes* caſ.

If a remainder be limited *Rich. filio Rich. M.* it's good, though he be a baſtard in vulgar reputation; for if a grant be made to a baſtard by the ſurname of him who is ſuppoſed to beget him, it is good, if he be known by ſuch a name [†].

[†] Lib. 6. fo. 65. Sr *Moyle Finches* caſ.

R. Tompſon had iſſue by one *Joan* before marriage, and afterwards he married the ſaid *Joan*, and made a feoffment in fee, and took back an eſtate to him for life, the remainder *Agnetæ filiæ prædict. Rich. & Joannæ: per Curiam* it's a good remainder, without averment that ſhe was known to be their daughter. It was objected, that a baſtard is not their daughter in law: but *Finchien* ſaid, that the daughter was born before marriage, ſo by their marriage after ſhe was their daughter; for *ſubſequens matrimonium tollit peccatum præcedens* [t]. So if the husband and wife be divorced *cauſa præcontractus*, the iſſue hath loſt his Surname, and is now become a baſtard, and *nullius filius*; yet becauſe he had once a lawfull ſurname, it is a good ground of reputation, to make him a reputed ſon, which is a good name of purchace [v].

[t] 41 E. 3. 18. 19.

[v] Lib. 6. fo. 65. 2 H. 6. 11. 8 H. 4. 15. 36 Aſſ. 13. 11 Aſſ. 4. 39 E. 3. 24.

L. made

L. made a feoffment to the uſe of himſelf, and after deviſed that his feoffees ſhould ſtand ſeiſed to the uſe of his daughter A. which in truth was a baſtard: this was a good deviſe of the land *per intentionem teſtatoris* [x].

[x] 15 Eliz. Dy. fo. 323. *Lingens* caſe.

A man had iſſue a baſtard, and after intermarried with the ſame woman by whom he had that baſtard, and had iſſue two ſons by her, and then deviſed all his goods to his children: ſome conceive that the baſtard ſhall take nothing, becauſe he is *nullius filius*. It's clear that the baſtard in ſuch a caſe ſhall not take by grant: but *Quære* as to a deviſe. And if the mother of the baſtard make ſuch a deviſe, it's clear that the baſtard ſhall take, becauſe he is certainly known to be the child of his mother [y].

[y] H. 4 E. 6. *Anonymus.* Moors rep. fo. 10. n. 39.

§ IX. Of an unlawfull Colledge.

1. *An unlawfull Colledge cannot be Executor.*
2. *What is underſtood by an unlawfull Colledge.*
3. *Whether the Church-wardens may ſue for a Legacy left unto the Church.*
4. *Particular perſons of an unlawfull Colledge may be appointed Executors.*

AN (1) unlawfull Colledge cannot be Executor [a]. By (2) an unlawfull Colledge in this place, I mean all Companies, Societies, Fraternities, and other Aſſemblies whatſoever, not confirmed nor allowed for a lawfull Corporation by authority of the Prince, or of ſome other by whom they ought to be confirmed or allowed [b]. Notwithſtanding, (3) if the Teſtator bequeath any goods or money to the Pariſhioners of any Pariſh, to the uſe of the Church, ſuch a bequeſt is good [c], and the Legacy may be recovered by the Church-wardens; who albeit in every reſpect they be not a lawfull Corporation, yet in this reſpect they be accounted a lawfull Corporation; I mean in favour of the Church [d]. Or (4) if the ſeverall and particular perſons of an unlawfull Colledge be appointed Executors, they are not to be repelled [*].

[a] 49 Aſſ. pl. 8. Brook abridg. tit. corpor. pl. 45. L. Collegium. C. de hæred. inſtit.

[b] L. Collegium. Bar. in L. cum ſenatus. de reb. dub. ff. Abbas in c. dilecta. de exceſſ. præla. extr. Fulb. lib. 1. Paral. fol. 35, 36.

[c] Lambert. Tract. de offic. gardianorum, fol. 43. Brook tit. corporation, n. 55. 73. 77. 84. tit. done, n. 17. 50. contra Fitz. tit. done, n. 1. 12 H. 7. 28. 37 H. 6. fo. 30. 10 H. 4. 3. b. Perk. 98. S. 510. 49 E. 3. fo. 3.

[d] Lambert. ubi ſupra. Fulb. lib. 1. Paral. fol. 42. 43. [*] Paul de Caſtro in L. cum ſenatus. ff. de reb. dub.

§ X. Of a Libeller.

HE that is condemned for a famous Libell is inteſtable, both actively and paſſively: that is to ſay, he can neither make a teſtament, nor receive any benefit by a teſtament [a].

[a] L. is cui. § ult. ff. de teſtam. Vaſq. de ſucceſ. progreſ. lib. 1. § 2. n. 18.

§ XI. Of Usurers, Sodomites, and others.

1. *Manifest Usurers and Sodomites can neither make a Testament, nor reap any benefit by another's Testament.*
2. *Whosoever is forbidden to make a Testament by reason of some crime, the same person is incapable of any benefit by the Testament of another.*

AS manifest (1) Usurers, Sodomites, and other criminous persons, are forbidden to make Testaments themselves, or to dispose their goods by their last Wills, (as is before at large declared [a];) so are they forbidden to reap any such benefit by the Testament of others: for this is a common received conclusion, (2) that he that cannot make a Testament or last Will, by reason of some crime by him committed, the same person is incapable of any Legacy of goods disposed by the Testament or last Will of another [b].

[a] Supra part. 2. §§ 15, 16, 17, 18.

[b] Gloss. in L. is cui. ff. de testa. Soarez. l. rec. sen. verb. test. n. 82. referens hanc op. esse com. Idem Jul. Clar. § test. q. 43. n. 2.

§ XII. Of an Uncertain person.

1. *If the Testator make* John at Stile *his Executor, and there be two persons of that name, neither of them is to be admitted.*

AN Uncertain person (1) cannot be Executor nor Legatary [a]. For example, the Testator doth make *Thomas Lante* his Executor, to whom also he giveth all his goods; and there be two persons, either of them being called *Thomas Lante*: in this case neither of them is to be admitted [b].

Divers other examples of uncertainty, with divers declarations of every example, do appear in the last part of this Book, where the Reader may be more fully satisfied [c], in what sort this former conclusion is to be admitted.

[a] § Incertis. Instit. de lega. Jo. An. Gem. & Franc. in c. si pater. de testam. 6.

[b] Minsing. in d. § incertis. Per. L. si quis. § si inter. de lega. 2.

[c] Infr. part. 7. § 6. cum seq.

§ XIII. Of a Recusant convict.

1. *Whether a Recusant convict may be Executor or Tutor.*

BY a Statute lately made against Popish Recusants, "Because (1) Recusants are not thought meet to be Executors or Administrators "to any person whatsoever, nor to have the education of their own children, much less the children of any other the King's Subjects within this "Realm; It is therefore enacted [d], That such Recusant convicted, or which "shall be convicted at the time of the death of any Testator, or at the "time of granting any administration, shall be disabled to be Executor or "Administrator, by force of any Testament after the said Act of Parliament

[d] Statut. Regis Jacobi An. 3. c. 5.

"ment to be made, or Letters of adminiſtration from that time to be "granted: nor ſhall he have the cuſtody of any child as Gardian in "chivalry, Gardian in ſocage, or Gardian in nurture; but that the next "of kin to ſuch child or children, to whom the lands cannot lawfully "deſcend, who nevertheleſs ſhall uſually reſort to ſome Church or "Chappell, and there hear Divine Service, and receive the holy Sa-"crament of the Lord's Supper thrice in the year next before, accor-"ding to the Laws of this Realm, ſhall have the cuſtody of the ſame "child, &c. as by the ſaid Statute more at large it doth and may ap-"pear. By which Statute it is alſo enacted, That every married wo-"man, being, or which ſhall be, a Popiſh Recuſant convict, (her "husband not ſtanding convict of Popiſh Recuſancy,) which ſhall "not conform her ſelf, and remain conformed, but ſhall forbear to "repair to ſome Church, or uſuall place of Common Prayer, "there to hear Divine Service and Sermons, (if any then be,) and "within the ſaid year receive the Sacrament of the Lord's Supper ac-"cording to the laws of this Realm, by the ſpace of one whole year "next before the death of her ſaid husband, ſhall (amongſt other pe-"nalties expreſſed in the ſaid Act) be diſabled to be Executrix or "Adminiſtratrix of her ſaid husband, and to demand or have any part "or portion of her ſaid husband's goods or chattels by any Law, cuſtome "or uſage whatſoever.

Whether an Alien may be an Executor or Adminiſtrator.

AN Alien born, and not made denizon, may be an Adminiſtrator, and have adminiſtration of leaſes as well as of perſonall things, becauſe he hath them as Executor in another's right, and not to his own uſe: and adjudged accordingly [a].

Debt brought by an Adminiſtrator, the def. pleads the pl. was an Alien *nee:* adjudged, *Quod reſpondra ouſter* [b].

An Alien born may make a will and Executors, and be an Executor, and ſue as Executor, if he be an alien friend, and not an alien enemy; ſo adjudged [c].

[a] P. 1 Car. C. B. S. *Upwell Carones* caſ. Crook part 1. fo. 9.
[b] P. 41 Eliz. rot. 1704. *Breck* verſ. *Philips.* Crook part 3. fo. 683. n. 16.
[c] 3 Eliz. *Paſcatius* caſe.

"reason to doubt, or Learn'd of admonition from the time to be
"[illegible] Sure the ordinary of any Bishop in the Kingdom
"[illegible] grand in Europe or Christian [illegible]
"[illegible] such child or children, to whom the said county [illegible]
"due [illegible] who accordingly shall [illegible] refuse to [illegible]
"Chappels and third time Divine Service, and receive the holy Sa-
"crament at the Lord's Supper thereof the year next before [illegible]
"[illegible] [illegible] [illegible] [illegible]
"[illegible] [illegible] by the said Statute aforesaid, That every [illegible]
"person [illegible] which Statute is also enacted, That every [illegible]
"man being, or which shall be a Popish Recusant convict, if his
"husband not being a convict of such Recusancy, shall within
"[illegible] [illegible] and [illegible] continue, but shall depart to
"[illegible] to their Dwelling, or usual place of Abode, [illegible]
"[illegible] and Seas, [illegible] within the said [illegible] of the Sessions
"[illegible] to the time of their Return, by the space of one whole
"next before the death of her said Husband, that every [illegible]
"[illegible] and shall [illegible] to be Executrix or
"[illegible]
"as aforesaid.

[illegible] [illegible] [illegible]

A Nd [illegible], and for [illegible], and be an Apostolical
and have [illegible] of [illegible] and [illegible]
[illegible] in both these [illegible]
[illegible]

Upon [illegible] [illegible] [illegible]
[illegible]

In [illegible] [illegible] a will and [illegible]
[illegible] Executor, If he [illegible] and not [illegible]
[illegible]

OF THE

OFFICE

OF AN

EXECUTOR.

The Sixth Part.

§ I. Of the ſeverall kinds of Executors.

1. *Three kinds of Executors.*
2. *Executor by the Law.*
3. *Executor by the Ordinary.*
4. *Executor by the Teſtament.*
5. *Divers kinds of Executors Teſtamentary.*
6. *The Office of an Executor Teſtamentary.*

NOW followeth the Sixth principall Part of this Treatiſe, wherein I promiſed to ſet forth the Office or Duty of an Executor, I mean, of an Executor Teſtamentary, that is to ſay, of him that is appointed by the Teſtator for the performance of the Will.

For thou ſhalt underſtand that there be (1) three kinds of Executors, or perſons which have to deal with the Execution of dead mens Wills, and diſpoſition of their goods [a], every of which have their ſeverall Offices. The firſt hath his authority *from the Law*, the ſecond *from the Ordinary*, the third *from the Teſtator* [b].

[a] Specul. de Inſtr. edit. § nunc vero aliqua. in prin.

[b] De hac trimembri executoris diviſione, in legitimum, dativum, & teſtamentarium, Specul. ubi ſupra: cui adjungas velim Jo. de Canibus tract. de executoribus ult. volunt. part. 2. q. 3. n. 22. f. (mihi) 120.

The (2) Executor which deriveth his authority from the *Law* is the Biſhop or Ordinary of every Dioceſe, unto whom the Execution of Teſtaments and laſt Wills, eſpecially *ad pias cauſas*, (no Executor being appointed by the Teſtator,) hath appertained and belonged [c]; and that not of late time, (as ſome have lately divined, or rather dreamed,) but ever ſince Chriſtianity was firſt received, and eſtabliſhed by Imperiall authority, or very ſhortly after: nor within this Realm of *England* onely, where the Biſhops, to whom the approbation of Teſtaments appertains [d], have continually, by the royall conſent of the godly Kings and Princes of this Realm *, exerciſed this office, and executed this charge, for and during ſo long time, and ſo many ages, that (if I be not deceived) there is not any memory or ancient record to the contrary [f]; I mean ſince Chriſtianity was embraced, and Paganiſm aboliſhed; but alſo throughout all the Kingdoms and Nations within the Chriſtian Empire. For not onely by the Laws Eccleſiaſticall [g], uſed and obſerved for many hundred of years, but alſo by the Civill Law [h], compoſed above a full thouſand years ſince [i], this office and charge of executing the aforeſaid Teſtaments and laſt Wills hath been impoſed upon the reverend Biſhops; in the ſincerity of whoſe conſciences all Chriſtian Laws, and namely the Law of this Land, hath repoſed greater confidence then in other lay-people, about the performance of dead mens Wills [k]. Hence it is, that every Biſhop is called *Ordinary*, as if other Judges were in this behalf incompetent or extraordinary [l]. Hence alſo it is, that the Biſhop is called *Executor legitimus*, Legall Executor, becauſe he onely is appointed Executor by the Law, where no Executor is appointed by the Teſtator [m].

[c] L. nulli. L. ſi quis ad declinand. C. de Epiſcop. & cler. c. tum nobis. c. nos quidem. c. Io. de teſta. extr. c. ſtatut. de teſta. l. 3. provincial. conſtit. Cant. c. ſtatuimus. eod. tit. l. conſtit. provinc. Ebor.

[d] Lindw. in d. c. ſtatut. & in c. ita quorundam. de teſta. l. 3. provinc. conſt. Cant. Jo. de Athon. in legatin. libertatem, de execut. teſta. Doct. & Stud. l. 2. cap. 28.

* C. accidit. de immunitate eccleſiaſt. libertatum. l. 3. provin. conſtit. Cant. Lind. in d. c. ſtatut. eccleſiaſticarum libertatum.

[f] Lindw. in d. c. accidit. qui etſi antiquus ſit, non potuit tamen hujus antiquitat. initium inveſtig. aſſequi, nempe cujus regis temporibus illud primo fuerat conceſſum, ut ille ingenue fatetur. [g] C. tua. c. nos. c. Io. de teſt. extr. [h] L. nulli. L. ſi quis ad decl. C. de epiſc. & cler. [i] Anno, viz. Chriſti 536. editus eſt ille Juſtiniani codex, in quo leges iſtæ inter alias inſeruntur. [k] Perkins in tit. de teſtamentis, f. 94. D. Smith tract. de repub. Ang. f. 102. [l] Ordinarius vero dicitur, qui lege, vel conſuetudine, vel principis beneficio, juriſdict. univerſaliter exercet. DD. in L. more. de jur. om. judic. [m] Specul. in d. § nunc vero aliqua, de Inſtr. edit. Jo. de Canib. de exec. ult. vol. part. 1. q. 3. Olden. de exec. ult. vol. tit. 2.

The Executor (3) which deriveth his authority from the *Biſhop* or *Ordinary* is he whom we call Adminiſtrator [n]. For when the Executor named in the Teſtament doth refuſe to be, or cannot be Executor, and when no Executor is named in the Will; it is lawfull for the Biſhop or Ordinary to commit adminiſtration [o], and to annex the Will to the letters of Adminiſtration [p]. And this Adminiſtrator, having his authority from the Ordinary, is chargeable with the performance of the Will, as if he had been appointed by the Teſtator [q], and is called in Law *Executor dativus* [r], becauſe he is given or aſſigned by the Ordinary, to whom originally and by Law this Execution doth appertain. But with us he is uſually called *Adminiſtrator* †, becauſe he is the Ordinarie's Deputy, or as it were his Steward or Bailiff, to deal and to adminiſter

[n] Specul. ubi ſupra.

[o] Stat. Ed. 3. an. 31. c. 21. & Stat. H. 8. an. 21. c. 5.

[p] Brook Abridg. tit. teſtament, n. 20.

[q] Brook Abridg. tit. deviſe 35. Stat. Ed. 3. an. 31. c. 11.

[r] Specul. in d. § nunc vero aliqua, de Inſtr. edi. Jo. de Can. & Olden. tract. de executor.

† Stat. Ed. 3. an. 31. c. 21. & ſtat. H. 8. an. 21. cap. 5.

niſter in ſtead of the Ordinary: and in that reſpect the Ordinary may call this his Adminiſtrator to an accompt [t]; and, if he will, may at any time revoke his Office of Adminiſtration, like as any other man may revoke his Atturney [v].

[t] Stat. Ed. 3. an. 31. c. 11.

[v] Brook tit. adminiſt. n. 3. & n. 33. ſi ſtat. 21 H. 8. non obſtat, quod quær. & tamen videtur quod ex juſta cauſa poterit revocari, ut in caſu Caroli Ducis Suffolciæ, 5 Ed. 6. non tamen pro ſuo libitu.

And this the Ordinary may doe, not onely expreſly, but alſo ſecretly, by appointing another Adminiſtrator (*a.*) If a man die inteſtate, after whoſe death the Ordinary doth firſt grant the Adminiſtration of his goods to one perſon, and afterwards upon cauſe, or peradventure without cauſe (*b*,) doth grant Adminiſtration of the goods of the ſaid deceaſed to another perſon; in this caſe the ſecond Adminiſtration is a ſecret, but as effectuall a revocation of the former Adminiſtration, as if the revocation had been expreſſed (*c*:) not much unlike a ſecond Teſtament, which is a ſecret, but an effectual revocation of the former (*d*;) or the conſtitution of a ſecond Proctor or Atturney, whereby the former is as effectually revoked, as if it were expreſly done (*e.*) Yet the acts done by the former Adminiſtrator, untill his authority were revoked, are good in Law (*f.*)

(*a*) Labridg. dez caſes edit. an. Do. 1599. tit. Exec. 11. 18. f. 177. & tit. Adminiſtrator, fo. 184. in princ.

(*b*) Labridg. dez caſes ubi ſupra, fo. 177.

(*c*) Ubi ſupra.

(*d*) Minſing. & Viglius in § poſteriore. Inſtit. quib. modis teſt. infir.

(*e*) L. ſi quis. § final. ff. de procur.

(*f*) Brook Abrid. tit. adminiſtrat. n. 33.

The Executor (4) which deriveth his authority from the *Teſtator* is he that is named Executor in the Teſtament, or to whom the execution of the Teſtament is committed by the dead man. For it is lawfull for every one having authority to make a Will, to appoint an Executor for the performance of the ſame Will [x]. This Executor is termed *Executor teſtamentarius*, a Teſtamentary Executor [y], and hath his authority immediately from the Teſtator [z], repreſenting the perſon of the dead man [a]; and may without the authority of the Ordinary enter to the Teſtator's goods and chattels [b]; and may be convented by the creditors and legataries of the deceaſed, as elſewhere is declared [c]; and after the probation of the Teſtament may alſo commence ſuit againſt the Teſtator's debtors [d]. And he doth not much differ from him in nature whoſe name in the Civill law is *hæres* *; ſaving that *hæres* by the Civil law is to have the reſidue of the Teſtator's goods, and may convert the ſame to his own uſe, (the funerals, debts and legacies diſcharged,) albeit the Teſtator do not expreſly will that he ſhould have the ſame [f]: whereas an Executor may not convert the reſidue to his own private uſe [g], nor any part of the Teſtator's goods, more then that which is left unto him by the Teſtator, or which the Ordinary ſhall allow him for

[x] Supra part. 3. § 1.

[y] Specul. in d. § nunc vero. & Jo. de Can. ac Jo. Old. de executor. ult. vol.

[z] Plow. li. 1. in caſ. inter Greisb. & Fox.

[a] Sichard. in Rub. de jur. delib. C. n. 1. Minſing. in tit. de hæred. inſtituend. Inſtit. lib. 2. Zaſ. in L. ſi res. ff. de excep. & præjud. Doct. & Stud lib. 2. cap. 7.

[b] Plowd. d. caſ. inter Greisb. & Fox.

[c] Supra part. 4. § 2. & infra hac parte §3.

[d] Perkins tit. teſtament, fol. 93. Brook tit. executor, n. 49. * Specul. de Inſtr. edit. § nunc vero aliqua, n. 16. Lindw. in c. ſtatut. lib. 3. provincial. conſt. Cant. verb. prius. tract. de Repub. Ang. lib. 3. c. 9. Haddon lib. refor. leg. Eccleſ. Ang. tit. de teſta. c. 1. c. 18. Adde quæ ſuperius annotavi part. 4. § 2. in princ. [f] L. 3. C. de teſtam. mil. § hæreditas. Inſtit. de hæred. inſtituend. L. interdum. ff. de hær. inſt. Lindw. in d. c. ſtatutum. verb. effectus, in fin. [g] Mag. Charta c. 18. Plow. in c. inter Norwood & Rede. Perkins tit. deviſe, c. 8. fol. 97. Littleton fol. 40. Ripa in L. cum filius famil. ff. de leg. 1. n. 21.

his

his travell and charges, or for ſome other cauſes hereafter expreſſed [h]. Inſomuch that if the Executor die inteſtate, the Teſtator alſo from that time ſhall be deemed inteſtate, and adminiſtration may be committed in this caſe of the goods not adminiſtred [i].

[h] Text. in d. c. ſtatuimus. Dom. Gem. in c. religioſus, lib. de teſta. 6. n. 9. Doct. & Stud. lib. 2. c. 10. Dyer fol. 2. & infra eod. part. § 3. n. 14. Greish. & Fox.

[i] Brook Abridg. tit. adminiſtr. n. 141. tit. execut. n. 149. Plowd. in caſ. inter

Concerning the office of him that is appointed Executor by Law, that is to ſay, of the Biſhop or Ordinary, and likewiſe concerning the office of the Executor appointed by the Ordinary, that is to ſay, of the Adminiſtrator, I do not here purpoſe to entreat; but onely of the office of an Executor Teſtamentary.

Of (5) Executors teſtamentary there be divers kinds: that is to ſay, ſome be nude Executors, ſuch as do reap no commodity by the Teſtament [k]; others not meer or naked Executors, but are to receive ſome benefit thereby, and may commence judicial action [l]; and again, of Executors ſome be univerſal, and ſome particular [m]. But becauſe I ſee no great uſe of theſe diſtinctions here in this place, I ſhall ſpeak of an Executor teſtamentary generally, and as it is agreeable to every teſtamentary Executor, be he nude, or otherwiſe, univerſall, or particular [n].

[k] DD. in L. ſi quis. de leg. 2. ff. Jo. de Athon. in legatin. libertatem, de executor. teſtam.

[l] Conſule Bald. in d. L. ſi quis, ubi docet executor, dici poſſe nudum duplici reſpectu, vel ob defectum commodi, vel ob defectum actionis.

[m] Olden. tract. de execut. ult. vol. tit. 3. & ſupr. part. 4. § 18.

[n] De officio executoris in genere, deinde de officio executoris teſtamentarii, legitimi, dativi, in ſpecie, vide poſt alios Jo. de Canib. de execut. ult. volunt. 2. part.

The (6) office of every Executor teſtamentary conſiſteth in two things: the firſt is, in accepting or refuſing the Executorſhip [o]; the ſecond dependeth on the reſolution of the Executor in accepting or refuſing the Executorſhip. For if he do accept the Executorſhip, then his office is extended diverſly: but eſpecially it conſiſteth in making of an Inventory [p]; in procuring the probation and approbation of the Teſtament [q]; in the payment of debts and legacies [r]; and finally, in the making of an Account [s]. But if he reſolve to refuſe the Executorſhip, his office is ſo much the leſs, conſiſting onely in the avoiding of ſuch things whereof mention is made hereafter [t].

[o] Vide Sichar. in Rub. de jure delib. C. & infr. eod. part. §§. 2, 3, 4.

[p] Inf. eod. part. § 6.

[q] Inf. eod. part. § 11.

[r] Inf. eod. part. § 16.

[s] Inf. eod. part. § 17.

[t] Inf. eod. part. § 22.

§ II. Of

§ II. Of the accepting or refuſing the Executorſhip: and firſt, whether the Executor may be compelled to accept the ſame.

1. *Divers queſtions about the accepting or refuſing of the Executorſhip.*
2. *The Executor may be cited to accept or to refuſe the Executorſhip.*
3. *If the Executor being cited will not appear, the Ordinary may commit the Adminiſtration of the goods of the deceaſed.*
4. *If the Executor named refuſe the Executorſhip, the Ordinary may commit the Adminiſtration.*
5. *The Executor cannot be preciſely compelled to undertake the Executorſhip.*
6. *What if he have already meddled with the goods of the Teſtator?*
7. *Whether the Executor refuſing the Executorſhip, ſhall loſe his Legacy given unto him in the ſame Teſtament.*

CONcerning (1) the accepting or refuſing of the Executorſhip, three queſtions may be demanded. Firſt, whether he that is named Executor in the Teſtament may be compelled to undertake the Executorſhip, or that it is in his power to refuſe the ſame [a]. Secondly, what is to be conſidered of him that is named Executor, whereby he may be reſolved whether it were better to accept or refuſe the Executorſhip [b]. Thirdly, how long time he that is named Executor hath to deliberate and determine of accepting or refuſing the Executorſhip [c].

To the firſt it may be anſwered, that he (2) that is named Executor may be cited to appear before the Ordinary, or other having authority to prove the Will, and there either to accept the Executorſhip, or at leaſt to refuſe the ſame [d]. And in caſe (3) either he will not appear, or appearing (4) refuſe to prove the Teſtament, the Ordinary, or other Judge, may commit the adminiſtration of the goods of the deceaſed, as if he had died inteſtate *; and the Adminiſtrators have action, and may adminiſter the goods of the deceaſed, as if he had died inteſtate: and their authority or act done is good and effectuall in the law [f] in the mean time, untill the Executors undertake the Executorſhip [g]; for then the Ordinary may revoke the adminiſtration before by him committed [h].

[a] De hac Q. conſulas Hen. Boi. in c. tua nos. de teſta. extr. Panor. in c. Johann. eo tit. & Bar. in L. 1. de leg. 2. ff.

[b] Infra § prox.

[c] Infr. cad. part. § 4.

[d] Boi. Panor. & Bar. ubi ſupra. Plowd. in caſu inter Greisb. & Fox.

* Brook Abridg. tit. adminiſt. n. 32. tit. exec. n. 49. 101. ſtat. H. 8. an. 31. c. 5.

[f] Brook ubi ſupra, & Plowd. ubi ſupra.

[g] Bald. in L. deberi. C. de fideicommiſ. liber. Plowd. in d. caſ. inter Greisb. & Fox. [h] Brook Abridg. tit. admin. n. 33. quod facilius procedit, cum adminiſtratio commiſſa fuerit (ut ſemper ſolet) ſalvo jure cujuſcunque, &c.

Yet nevertheleſs, if the Ordinary knowing that there is a Teſtament, and an Executor named therein, adventure to grant adminiſtration of the deceaſed's goods, not having firſt called the Executor to prove the Will, and to accept or refuſe the Executorſhip; in this caſe it ſeemeth, that when the Executor ſhall prove the Will, he may ſue the Adminiſtrator in an action of treſpaſs (*a*), notwithſtanding the Adminiſtration granted by the Ordinary: for that he hath no power to grant Adminiſtration, but when the perſon deceaſed did die inteſtate, or that the Executor either will not or cannot perform the office of an Executor (*b*).

(*a*) Labridg. dez caſes edit. Anno Dom. 1599. tit. adminiſtr. n. 2. fol. 183.
(*b*) Starut. H. 8. an. 21. c. 5.

But he (5) that is named Executor cannot be preciſely compelled to ſtand to the Will, and undertake the Executorſhip [i], unleſs (6) he have already meddled with the goods of the Teſtator as Executor: for then he is not onely to be compelled to perform the office of an Executor [k]; but alſo if he ſhould refuſe, and the Ordinary commit the Adminiſtration unto him, this refuſall is void, and he ſhall be charged as Executor [l].

[i] Panor. in c. Io. de teſt. extr. n. 3. Olden. de exec. ult. volunt. tit. 7. in fin.
[k] Panor. & Olden. ubi ſupr. Boi. in c. tua. de teſta. extr. Plowd. in caſ. inter Greisb. & Fox.
[l] Firz. Abridg. tit. executor, n. 35.

Moreover, albeit (7) the Executor named, who hath not meddled with the Adminiſtration of the goods of the deceaſed, cannot be preciſely or abſolutely compelled; yet if any legacy be left unto him in the Teſtament, he may be compelled to ſtand to the Executorſhip, or elſe to loſe the legacy: ſo that he ſhall not reap the benefit, if, being duly admoniſhed, he refuſe the burthen [m].

[m] Quæ poſitio locum vendicat, etiamſi executor ſit conjuncta perſona, ut habet communis opin. Gr. Theſaur. com. op. verb. tutor. Rom. conſil. 235. Add. Jo. de Canib. d. tract. de executor. ubi plures enumerat hujus regulæ limitationes, nempe quod non eſt compellendus; quarum firmitatem quia ſuſpectam habeo, eas ſilentio prætereo.

Treſpaſs. It was found by verdict, that Sir *Ralph Rowlet*, being poſſeſſed of a term, made his laſt Will, and thereof made the Lord Keeper *Bacon*, *Catlin* Chief Juſtice, and others, his Executors, and deviſed the term to the Lord *Catlin*, and died; all the Executors wrote a letter to Doctor *Dale*, Judge of the Prerogative Court, that they could not intend the execution of the Will, and deſired him to commit the adminiſtration to *Henry Goodyer*, the next of kin to the Teſtator; the adminiſtration was accordingly granted, but the Regiſter entred the cauſe, *viz.* for that the Executors did defer *ſuſcipere onus teſtamenti*; after this, *Catlin* entred upon the land deviſed to him, and granted it over: the doubt was, whether this grant was good. 1. Whether the Letter was a ſufficient renunciation. 2. Whether (if they once refuſe) they may, after adminiſtration granted, adminiſter at their pleaſure. Doctour *Ford* declared to the Juſtices, that by the Civill Law a renunciation may as well be by matter in fact, as by a judicial act; and they may refuſe by parol: and cited a rule in the Civill Law, *Non vult eſſe hæres, qui ad alium vult transferre hæreditatem*; and, *Hæreditas eſt totum jus quod defunctus habuit.* And to the ſecond he ſaid, *Qui ſemel repudiaverit hæreditatem amplius hæreditatem petere non poteſt*; and, *Qui ſemel repudiaverit*, ſhall not afterwards be Executor, *quia tranſit in contractum*.

tractum: and that Executors cannot refuſe for one time, but for ever: but they may pray time to conſider of taking upon them the Executorſhip, and it ought to be granted; and in that caſe the Ordinary is to grant in the mean time *literas ad colligendum*, &c. but is not to grant adminiſtration. And for theſe reaſons, there being a refuſall, the grant made after adminiſtration committed was void: and ſo was the opinion of the Court [a].

[a] M. 29 & 30 Eliz. C. B. *Broker* verſ. *Charter*. Crook part 3. fol. 92.

Actions maintainable by Executors or Adminiſtrators.

EXecutors may charge perſons for any debt or duty due to the Teſtator, as the Executor himſelf might have done: and the ſame Actions that the Teſtator himſelf might have had, the ſame for the moſt part may Executors have alſo. And therefore it was adjudged, that Executors may have and maintain a Trover and converſion upon Trover and converſion in the time of the Teſtator *.

* H. 37 Eliz. B. C. *Eliz.* Counteſs of *Rutland* verſ. *Iſabel* Counteſs of *Rutland*. Crook part 3. fol. 377. H. 21 Eliz. rot. 410. *Ruſſet* and *Pratts* caſ. Ibid. lib. 5. fol. 30. *Ruſſels* caſe.

If three Executors bring a Trover and converſion, and the one is an infant, and they all ſue by Attorney, it is good, becauſe they are all but one perſon, and ſue *en auter droit*, and not in their own right: and it is not reaſonable that one or two ſhould ſue by Attorney, and a third by Gardian or *prochein amie* [b].

[b] Crook part 3 f. 378.

Quare impedit lieth for an Executor upon a diſturbance made in the life-time of the Teſtator [c].

[c] P. 31 Eliz. C. B. *Sale* verſ. Eveſque de *Lichfield*.

Treſpaſs by an Adminiſtrator, *de bonis aſportatis in vita inteſtati*: after verdict it was moved in arreſt of Judgement, that this Action is not given by the Stat. of 4 E. 3. c. 7. but ruled without argument, that the Action lay by the equity of the Statute; for it is in equall miſchief [d].

[d] P. 37 Eliz. B. R. *Smith* verſ. *Vangar Colgay*. Crook part 3. fol. 384. 14 H. 7. 13.

An *Aſſumpſit* by the Executor upon a promiſe made to the Teſtator, and did not ſhew forth the Teſtament in the Declaration: adjudged, that it is matter of ſubſtance, not of form: for otherwiſe the Executor doth not entitle himſelf to the Action, without ſhewing the Teſtament *.

* M. 38 & 39 Eliz. B. R. *Edwards* verſ. *Fuller*. *Stapleton*. Crook part 3. fol. 551. Crook part 2. pl 1. P. 10 Jac. B. R. *Browning* verſ.

Treſpaſs by the Plaintiff as Executor of A. againſt B. for that he took and eſloigned goods to places unknown which were the Teſtator's *tempore mortis ſuæ*, &c. the Defendant thereupon demurred in Law: it was moved that this declaration was not good, becauſe there ought to have been mentioned, that the goods were taken *extra cuſtodiam ſuam*; as the Regiſt. fol. 49. 42 E. 3. 26. 48 E. 3. 10. 11 H. 4. 12. But adjudged, that becauſe the Plaintiff had election to bring the action either of his own poſſeſſion, or as Executor, and foraſmuch as by the

Teſtator's death the poſſeſſion is caſt upon the Executor; it is to be intended that the goods were *in cuſtodia ſua*, and for that cauſe the declaration was adjudged good [f].

[f] H. 3 Jac. B. R. *Adams* verſ. *Cheverel.* Crook part 2. fo. 113.

Scire fac. in Chancery as Adminiſtrator to *G.* Earl of *S.* upon a recogniſance of 4000 li. conditioned for performance of Covenants; the parties being at iſſue, it was given for the Plaintiff *C. B.* It was moved in arreſt of judgement, becauſe it is not mentioned in the writ, *Quod profert literas adminiſtrationis:* but becauſe it was in a writ founded upon the record, and the courſe is not to mention it in writs, and ſo be all the precedents in Chancery; it was ruled to be well enough [g].

[g] 39 & 40 Eliz. the Earl of *Shrewsbury* verſ. Sir *Walter Lewſon.* Crook part 3. fo. 592.

The Stat. 4 E. 3. is taken by equity, and Adminiſtrators who are in the ſame miſchief ſhall have the ſame remedy, albeit they be not named in the Statute [h].

[h] 14 H. 7. 17. Old N. B. 103. 7 H. 4. 6.

An Executor ſhall have a replevin of goods taken *in vita teſtatoris*, and likewiſe an *ejectione firmæ* of an Ouſter made to the Teſtator [i].

[i] Old N. B. 123. 17 E. 3. exec. 106.

A man condemned in debt and impriſoned, if the gaoler ſuffer him to eſcape, the party or his Executors may have an action of debt againſt the gaoler [k].

[k] F. N. B. 121. a. Fitz. debt, pl. 36. 127.

An action for debt is brought againſt B. and judgement againſt him for it, and he impriſoned; A. dies, the gaoler ſuffers B. to eſcape; an action of debt will lie for the Executor or Adminiſtrator upon this eſcape againſt the gaoler: but if he be impriſoned upon a mean proceſs, as a *Latitat* or Bill of *Middleſex*, *quære*; becauſe it is a perſonal fact done to the party, and ſo *moritur cum perſona* [l].

[l] T. 2 Car. rot. 1365. *Lemaſons* and *Dickſons* caſ. B. R. Poph. rep. 189. Vid. T. 14 Jac. *Probe* & *Mains* caſ. quod ſur mean proces pur eſcape action ne gift. Popham rep. ibid.

Executor or Adminiſtrator may have a *Superſedeas* upon a writ of Error brought by the Executor or Adminiſtrator, without ſpeciall ſureties to pay the condemnation, if the Judgement ſhould be affirmed: and the Stat. 3 Jac. c. 8. that all actions of debt, &c. muſt be intended where it is againſt the party himſelf, upon his obligation, or where Judgement is generall againſt the Executors; but where the Judgement is ſpecial, that execution ſhall be of the goods of the Teſtator, and dammages onely *de bonis propriis*, it is not reaſonable that the party ſhould be enforced to find ſureties to pay the entire condemnation with his own goods [m].

[m] M. 12 Jac. *Goldſmith* verſ. the Lady *Plat* executrix. Crook part 2. fol. 352. Crook part 1. fol. 42. *Mildmays* caſe.

A. as Adminiſtrator of B. brings an action for debt againſt C. and had judgement to recover; C. being impriſoned for it eſcapes; A. as Executor of B. brings an action for this eſcape: and adjudged the action doth not lie, becauſe the firſt recovery was as Adminiſtrator, and the action upon the eſcape is as Executor, which cannot be, that one ſhould die inteſtate, and yet have an Executor: and this action being brought as Executor, diſaffirms the firſt ſuit, which ſuppoſes a dying inteſtate; and the action upon the eſcape ought to purſue the firſt action [n].

[n] H. 13 Jac. *Slingsbye* verſ. *Lambert.* Crook part 2. fol. 394.

If a man recover as Adminiſtrator, where he is Executor, the party againſt whom the recovery is ſhall have an *Audita querela*, ſuppoſing that he had no right to recover [o].

If an action be brought as Adminiſtrator, he ought to ſhew, *& profert hic in Curiam literas adminiſtratorias*; for it is matter of ſubſtance, and not aided by any Statute [p].

If an Executor brings an action and recovers, and dies inteſtate, the Adminiſtrator of the firſt man may not ſue execution by *Scire fac.* for there is not any privity between them [q].

A woman and another perſon were made Executors, the woman took husband, who did not alter the property of the goods of the Teſtator; and then the wife died: it was adjudged that the other Executor might have an action of detinue againſt the husband for the ſame goods [r].

An Executor brings debt upon an obligation, the Defendant pleads *Non eſt factum*, and found for him: adjudged that the Pl. ſhould pay no coſts upon the Stat. 4 Jac. becauſe he ſues *en auter droit*, and of matter which lay not in his cogniſance; therefore the Law never intended to give coſts againſt him [†].

If an Adminiſtrator recovers damage on treſpaſs *de bonis aſportatis in vita teſtatoris*, and then die inteſtate, his Adminiſtrator may have execution thereon: otherwiſe of a debt recovered which was due to the inteſtate [t].

If A. makes a promiſe to B. and after B. dies inteſtate, and Adminiſtration of his goods be committed to C. who after dies alſo inteſtate, and after Adminiſtration is committed to D. of the goods of C; in this caſe D. cannot have an action on the promiſe made to B. as Adminiſtrator to C. for he is not Adminiſtrator to B. in that adminiſtration was not granted to him of the goods of B. unadminiſtred by C [v].

A perſon made a leaſe for years rendring rent at *Michaelmas*, or within a month after; the leſſee enters; the leſſor dies within ten daies after *Mich.* Adjudged that the Executor had no remedy for this rent; for the rent was not due in the Teſtator's time, nor untill the end of the month; and in ſuch caſe the rent ſhall go to the heir, and not to the Executor [x].

Detinue brought by an Executrix againſt her own husband's Executor; the caſe was this: One *Falconer*, who was the Pl^s. firſt husband, made his will, gave divers legacies, and towards the end of his ſaid will ſaid, The reſidue of all my goods I give and bequeath to *Frances* my wife, whom I make my ſole Executrix of this my laſt will, to diſpoſe for the health of my ſoul, and to pay my debts, and died indebted to divers perſons, to whom the ſaid *Frances* paid the debts and all the legacies, having then goods in her hands, for which this action was brought; ſhe having after married one *Jo. Hunks*, who made the Def. his Executor, to whoſe hands the ſaid goods came, upon demurr' Judgement was, that the Pl. ſhould recover; for notwithſtanding the deviſe, *viz.* of the reſidue as above ſaid, ſhe hath them not as Deviſee, but as Executrix, becauſe the words of the will can

[o] Crook part 2. fol. 394. 2 R. 3. fol. 8.

[p] M. 14 Jac. Sir *Jo. Cutts* caſ. Crook p. 2. fo. 409. 412. 28 H. 6. 31. 16 E. 4. 8. 21 H. 6. 23. Pl. Com. 52.

[q] 26 H. 8. 7. C. lib. 5. fol. 9. *Brudnels* caſ. C. lib. 1. fol. 31. *Shellyes* caſ. Anderſ. rep. part. 1. c. 49. 2 R. 3. fol. 8. 10 E. 3. 26.

[r] P. 1 Eliz. Pendloes rep.

[†] M. 7 Jac. *Haywarth* verſ. *David.* Crook part. 2. fol. 229.

[t] M. 44 & 45 Eliz. B. R. *Yate* verſ. *Goth.* Moores rep. n. 931.

[v] M. 15 Car. B. R. inter *Goſlin* & *Osborn.* Rolls abridgem. tit. execut. lit. E.

[x] T. 39 Eliz. C. B. *Pilkington* verſ. *Dalton.* Crook part 3. fo. 575. C. lib. 10. fol. 129. *Cluns* caſe.

have no other intendment, then that she should enjoy them as Executrix [x].

[x] M. 15, 16 Eliz. C. B. *Hunks* verſ. *Alborough.* Anderſ. rep. c. 45. Moores rep. fo. 99. n. 242.

One Co-executor cannot sue another for possession of the Testator's goods, for that all the Executors to the same Testator are but as one, and no man can sue himself [y]. Nevertheless, if the Testator makes divers Executors, and do bequeath to the one of them the residue of his goods, it is not onely lawfull for him to whom they are so bequeathed to retain the same, but also if the other Executor enter thereunto, he is subject to an action of trespass [z]. Also if the Executor of a Co-executor hath any goods belonging to the first Testator, the other surviving, the Co-executor of the first Testator may have an action against the Executor of that deceased Co-executor for the same [a].

[y] Brook tit. execut. pl. 98.

[z] Brook ibid. pl. 104.

[a] Brook tit. execut, n. 99.

If there be two Administrations granted together, he that is the rightfull Administrator may sue the wrongfull for the goods in his custody [b].

[b] C. lib. 8. fol. 135.

If lessee for years deviseth his term to another, and maketh his Executors, and dieth, and the Executors doe wast, and afterwards assent to the legacy; adjudged, that although between the Executors and devisee it hath relation, and the devisee is in by the devisor, yet an action of wast is maintainable against the Executors in the *Tenuit* [c].

[c] T. 4 Eliz. C. B. Lib. 5. fol. 12. *Saunders* case.

Debt upon an escape by Executors must be in the *Detinet* onely, and not in the *Debet & detinet* [d]. Vid. *Hiscocks* case cited in *Hargraves* case, lib. 5. 31.

[d] M. 17 Jac. *Lancastell* verſ. *Sidley.* Hob. rep. 272. 264. Lib. 5. fo. 31. *Hargraves* caſ.

Executor to the Lady *P. port debt* upon an obligation, the condition was, for the payment annually of 30 li. during the life of the Lady at the feasts of St. *Mich.* and the Annunciation, or within 30 daies after every of the feasts; the Lady dies within the 30 daies: the question was, whether this shall discharge the payment due at the feast before her death; and the Court held that it did [*].

[*] H. 37 Eliz. B. R. *Price* verſ. *Williams.* Crook part 3. fo. 380.

Where an Executor shall be charged upon the Deed of the Testator, though he be not named in the Deed; and where he shall be charged de bonis propriis, *and where* de bonis Testatoris *onely.*

IF a man hath a stock of Sheep or other personal goods for a time, and doth covenant for him and his assigns at the end of the term, to deliver the stock, or such a sum for them; the lessee assigns them over; the assignee shall not be charged with this Covenant, for it is a personal Covenant, and wants privity; but the same shall bind his Executors and Administrators [a].

[a] C. lib. 5. fo. 17. *Spencers* case.

Lessee for years by Indenture covenanted for himself, that within three years he would build a new house upon the Lands; no mention was made of the Executors; the term expired, and the lessee died: *per Curiam*, his Executors shall be charged, though not named in the Covenant [b].

[b] T. 28 H. 8. Dy. 14. 23.

If

If one makes a leaſe of land by deed wherein he hath nothing, by the word *demiſi*, and dies before an action of Covenant is brought againſt him; it will be maintainable againſt his Executor: for the word (*demiſi*) implies a power to let, as well as (*dedi*) doth a power of giving [c].

If one be leſſee for years or life without any deed, and his rent being behind dieth, his Executor ſhall be liable to the payment of this rent [d]. But if the leſſee for years ſell or grant away his term or leaſe, and die, his Executor ſhall not be charged for any rent due after the death of his Teſtator, though himſelf in his life-time was ſtill liable for the rent to grow due after, untill the leſſor accept the aſſignee for his tenant [*].

A. covenants with his leſſee to pay all quit-rents, and dieth. It is a *Quære* if his Executors be bound there. Dy. fol. 114. And the books are, that it is a perſonal covenant onely, and dieth with the perſon. 49 E. 3. 17. 18 E. 3. 2. Finch lib. 1. fol. 17. But this *Quære* is reſolved in Lib. 5. fol. 16. *Spencers* caſe [f].

Debt was brought againſt two Executors, one appeared and confeſſed the action, the other made default; and judgement was given to recover the goods of the Teſtator in both their hands; to which purpoſe a *Fieri fac.* iſſued to the Sheriff; the Sheriff returned *Nihil*; but he that made default had goods of the Teſtator, and had waſted them before the receipt of the writ; whereupon a *Scire fac.* iſſued out againſt him onely who had waſted the goods: and upon a *Scire fec.* returned, execution was awarded againſt him onely of his proper goods, without any execution ſued againſt his Companion [g].

If a man condemned in debt dieth before execution; it was held by the Court, that his Adminiſtrators was bound to pay this debt upon record before Specialties: and if they be ſued upon an obligation, they may plead a Recovery againſt them which is not executed; but if they do not plead it, but ſuffer a Judgement againſt them and execution before execution ſued of the firſt Judgement, they ſhall be charged of their own goods, for that by the firſt Judgement the goods were charged [h].

Debt againſt an Executor, the Pl. had Judgement to recover *de bonis teſtatoris*, and thereupon a *Scire fac.* was awarded, and the Sheriff returned, *Quod nulla habuit bona teſtatoris*, and the Pl. ſurmiſeth, that he had waſted the Teſtator's goods; whereupon he prayed a *Scire fac.* why he ſhould not have execution *de bonis propriis*. *Per Curiam*, this writ ſhall not be awarded upon the ſurmiſe of the party upon a *devaſtavit*; nor in any caſe, where the Judgement is *de bonis propriis*, unleſs it be upon return of the Sheriff, when he returns a *devaſtavit* [i].

Debt againſt two Executors; one pleads a recovery in *B. R.* againſt him in bar, the other that he had fully adminiſtred: againſt the firſt the Pl. did aver covin; and upon the ſecond plea they were at iſſue: the firſt iſſue is found for the Pl. and as to the other, it was found, that the defendants had goods in their hands of their Teſtator not adminiſtred to 30 li. the debt being 100 li. the Pl. had Judgement to recover *de bonis teſtatoris*;

[c] Lib. 4. *Nokes* caſe. P. 11 Jac. tot. 1358. *Holder* verſ *Taylor*. Hob. rep. fol. 12.

[d] 21 H. 6. 1. 44 E. 3. 43.

[*] 44 E. 3. 5. 7 E. 3. 11. 14 H. 7. 4. Dyer 247. Lib. 5. *Spencers* caſe.

[f] Dy. 114. 49 E. 3. 17. 18 E. 3. 2. Finch lib. 1. 19. lib. 5. *Spencers* caſe.

[g] M. 4 Eliz. Dy. fol. 210.

[h] 5 E. 6. Dy. fol. 80. C. lib. 5. fol. 28. *Harriſons* caſe.

[i] M. 38, 39 Eliz. C. B. *Aldworth* verſus *Peel*. Crook part 3. fo. 530. n. 61.

teſtatoris; a *Scire fac.* is brought againſt the Executors, ſuppoſing many other goods came to their hands after the Judgement. *Per Curiam*, where upon nothing in their hands pleaded, it is found, that ſome part of the ſum in demand is in the hands of the Executors, there, upon a ſurmiſe of goods come to their hands, the Plaintiff may have a *Scire fac.* Contrary, where upon iſſue it is found fully for the Defendants, that they have nothing in their hands[k].

[k] M. 30 Eliz. C. B. *Bracebridge* and *Baſkervils* caſ. Leon. fol. 67.

Error *ſur Judgement:* the error aſſigned was, that in debt upon an obligation againſt an Executor for the performance of covenants in a leaſe made unto the Teſtator, the breach was aſſigned in the time of the Executor, for not repairing of a houſe; and iſſue being found againſt the Defendant, Judgement was, *Quod recuperet* the debt *de bonis teſtatoris ſi*, &c. *& ſi non, tunc de bonis propriis:* where it was alledged, that inaſmuch as this breach is declared to be by the Executor himſelf, and in his default, the recovery ought to have been, as well for the debt as for the dammages, *de bonis propriis. Per Curiam*, the Executor is chargeable in debt by the covenant made by the Teſtator, and therefore ſhall be charged onely for the principal with the goods of the Teſtator: and by no act or falſe plea ſhall he be charged *de bonis propriis*, but when he pleads the falſe plea of *ne unques Executor*, which utterly ouſts him from the benefit of the Teſtament[l].

[l] M. 20 Jac. B. R. *Bull* verſ. *Wheeler.* Crook part 2. fo. 647. Dyer fol. 324. M. 21 Jac. B. R. *Bridgman* verſ. *Lightfoot.* Crook part 2. fol. 671.

In debt againſt Executors, who plead *ne unques Executors, nec adminiſter come Executors*, the Judgement ſhall be *de bonis teſtatoris*, if they have goods of the Teſtator's, if not, *de bonis propriis*[m]. And there it is ſaid, that if they plead *Non eſt factum*, or other plea which ſhall bar the Plaintiff for ever, and it be found againſt them, the judgement ſhall be *ut ſupra.* But *Quære* of the plea *Non eſt factum*; for that doth not lie in their notice, if it were the Teſtator's deed or not. But of ſuch things of which they may have perfect notice, and are perpetuall bars or otherwiſe, as if they plead a releaſe to themſelves or an acquittance, and the ſame be found againſt them, there the Judgement ſhall be *de bonis teſtatoris, & ſi non, de bonis propriis.* But if they plead a releaſe or acquittance made to the Teſtator, of which they cannot have perfect notice, there the Judgement ſhall be *de bonis teſtatoris*[n].

[m] 11 H. 4. 5. 33 H. 6. 23, 24. 9 H. 7. 15.

[n] 6 E. 4. 2. 23 H. 8. Brook exec. 22. 46 E. 3. 9, 10.

Debt againſt Executors, who pleaded Fully adminiſtred, and it was found againſt them; the Judgement ſhall be *de bonis teſtatoris*[o]. For the plea is no perpetual bar, but is a bar for the time; for if Aſſets happen after, they ſhall be charged: and ſo it is where one Executor pleads miſnomer, or that another is Executor not named in the writ, and it is found againſt them[p].

[o] 2 H. 6. 12. 9 H. 6. 5. 34 H. 6. fol. 22.

[p] 18 H. 6. Br. exec. pl. 18.

Actions

Actions maintainable againſt Executors or Adminiſtrators; and what Pleas they may ſafely plead.

ALthough the Executor hath not actually laid his hands upon any of the Teſtator's goods, yet ſhall he be ſaid to be in poſſeſſion of them, ſo as to ſtand liable to the Creditors, ſo far as they extend in value, though others do afterwards purloin them [a].

[a] *Office of Executor*, c. 10.

Debt brought in the *detinet* againſt a woman as Adminiſtratrix of her husband, for arrerages of rent upon a leaſe for years, *viz.* for a Quarter's rent due in the life-time of the inteſtate, and two Quarters in her own time; it was found for the Plaintiff. It was objected that the action ought to have been in the *debet* and *detinet*, according to *Hargrave*'s caſe, lib. 5. fol. 31. but it was reſolved, that the action was well brought in the *detinet*, ſhe having the intereſt onely as Adminiſtratrix: and *Hargraves* caſe was denied to be Law, and the Judgement in that caſe was reverſed [b].

[b] M. 7 Car. B. R. *Smith* and *Norfolks* caſe. Crook part 1. fol. 163.

Debt againſt an Executor upon an obligation, who pleaded, that the Teſtator at the time of his death was indebted to the King for his office of Sheriff-ſhip: but becauſe it was not averred, that it was *verum & juſtum debitum, & minime ſolutum*, it was adjudged for the Plaintiff [c].

[c] T. 5 Jac. B. R. *Woodal* and *Hugates* caſe. Crook part 2. fol. 182.

Scire fac. againſt an Adminiſtratrix, to have execution upon a Judgment againſt the inteſtate: the Defendant pleaded, *Quod nulla habet bona quæ fuerunt inteſtati tempore mortis ſuæ in manibus ſuis adminiſtranda, nec habuit die impetrationis brevis, nec unquam poſtea, &c.* Adjudged no good plea: for a Judgement cannot be anſwered without another Judgement; and it may be ſhe had adminiſtred all the goods in paying debts upon Specialties, which is not any adminiſtration to bar the Plaintiff; or it may be he had debts upon Statute or recogniſance, which are not allowable againſt a Judgement [d].

[d] T. 39 Eliz. C. B. *Ordwey* verſ. *Godfry*. Crook part 3 fo. 575.

Promiſe by the Teſtator, that if J. S. marry his daughter, he would give him a 100 li. and as much as to any other of his children; the marriage took effect; an action upon the caſe is brought by J. S. againſt the Executors of the Teſtator: and adjudged, that the Executors are chargeable as well for this collateral promiſe as for a debt [*].

[*] T. 13 Jac. rot. 932. *Sanders* verſ. *Eſterly*. Crook part 2. fo. 417.

An action of the caſe lieth againſt an Executor upon a ſimple contract of the Teſtator [e].

[e] Lib. 5. *Slades* caſe.

An action lieth againſt Executors for arrerages of account found before Auditors [f].

[f] Lib. 9. fol. 86. Pl. fol. 182. F. N. B. 121. 3 H. 6. 35.

Where one hath a tally of the Exchequer to receive money of ſome cuſtomer, receiver, or other officer of the King's, and delivereth it to him, he then having mony of the King's in his hands, if he die without paying of the ſame, his Executor ſhall ſtand chargeable with the payment thereof [g].

[g] 27 H. 6. 4. 15 E. 4. 16. C. lib. 9. fol. 87.

Scire fac. upon a Judgment againſt a Teſtator in debt brought againſt his Executors, who pleaded, that before they had knowledge of this Judgment, they had fully adminiſtred all the Teſtator's goods in payment of debts upon Obligations. It was adjudged no plea, for at their peril they ought to take knowledge of debts of record, and ought firſt of all (unleſs debts due to the Queen) to have ſatisfied them: it was adjudged accordingly [i].

[i] 43 Eliz. C. B. *Littleton* and *Hobbins* caſ. Crook part 3. fo. 793.

Debt againſt an Executor upon an arbitrement made in the time of the Teſtator: it was demurr'd in Law, whether the Action lay, becauſe the Teſtator might have waged his Law: and adjudged it lay not [k].

[k] P. 39 Eliz. *Hampton* verſ. *Boyer*, fo. 557. Crook part 3. fo. 600.

Error in *C. B.* againſt 3 Executors: the error aſſigned was, that one of them died depending the writ before Judgment. *Per Curiam* it's no error [l].

[l] H. 41 Eliz. *Anonymus*. Crook part 3. fo. 652. 3 H. 7. 1. 38 E. 3. 11.

Debt againſt Executor, who pleaded he had *riens en ſes mains*, but certain goods diſtrained and impounded: it was adjudged to be no aſſets to charge him [m].

[m] M. 25 Eliz. C. B. Crook part 3. Pl. 8.

Action ſur l'caſe ſur trover & converſion of goods: the Caſe was; A recovery was had in the Exchequer againſt an Executor of debt and dammages, and a *Fieri fac.* iſſued out *de bonis teſtatoris, ſi, &c. ſi nemy, damna de propriis*; the Executor dies; the Sheriff makes Execution of the Teſtator's goods before the return of the writ: adjudged good, notwithſtanding his death after the teſte of the writ [n].

[n] H. 31 Eliz. B. R. rot. 31. *Moſſe* verſ. *Pack.* Moores rep. fo. 352. n. 473.

An Executor ſhall not be charged without Specialty wherein the Teſtator might wage his law; for that an Executor cannot wage his law of other mens contracts [o].

[o] 46 E. 3. 10. b. 11 H. 6.

Debt againſt an Executor upon an obligation made by his Teſtator; the plaintif was non-ſuited; the defendant had coſts by order of Court: otherwiſe it is where an Executor is plaintiff and is non-ſuited; for it cannot be intended, that it was conceived upon malice by him [p]. And the Stat. 4 Jac. ought to have a reaſonable intendment, and no default can be preſumed in the Executor, who complains, becauſe it concerns other mens facts, whereof he can have no perfect knowledge; and ſo it was reſolved by the Courts of Com. B. and B. R [q].

[p] M. 38, 39 Eliz. *Fetherſton* verſ. *Allybon.* Crook part 3. n. 25. fo. 503.

[q] M. 7 Jac. B. R. Yelvertons rep.

Action upon the caſe *ſur. Indebitatus aſſumpſit* of the Teſtator doth well lie againſt the Executors [r].

[r] T. 44 Eliz. B. R. *Slades* caſ. Cok. lib. 4. fo. 92. b.

Debt againſt the defendant as Executrix of J. S. upon *plene adminiſtravit* pleaded, it was found by verdict, that the Teſtator at the time of his death had goods to the value of 100 l. and was bound to another by obligation in 100 l. and that the defendant had taken in this obligation, and made another in her own name with ſureties to the obligor. *Per Curiam*, this was an adminiſtration, and it is in the nature of a payment, and ſo much of the Teſtator's debt is by this diſcharged [t].

[t] M. 30, 31 Eliz. *Martin* verſ. *Alice Whipper*. Crook part 3. fo. 114. M. 28 & 29 Eliz. totul. 2625. inter *Stampe* & *Hutchins*, adjudged accordingly.

Debt againſt one as Adminiſtrator to N. upon an obligation; the defendant ſhews the cuſtom of *London* to be, that if a contract be made by a Citizen, to pay mony to another Citizen, and he who made the contract dies, that his Executors or Adminiſtrators ſhall be chargeable therewith, as if it were upon an obligation; and ſhews farther how the

the inteſtate was indebted upon contract to A. who had recovered againſt him, and that he had *riens ouſter en ſes maines*, &c. Adjudged that the cuſtom is good, for the Executors or Adminiſtrators to pay debts upon ſimple contracts: cuſtoms in *London* are confirmed by Act of Parliament, and are now as ſtrong as a Statute, and the cuſtom is reaſonable, becauſe the Executor or Adminiſtrator is bound in conſcience to pay debts upon contracts as well as obligation, though the Law hath given prioritie to debts upon obligation [t].

A. covenanted with B. to put his ſon an apprentice to C. or otherwiſe, that his Executors ſhall pay B. 20 l. A. doth not put his ſon an apprentice to C. and dieth; B. brings debt againſt the Executors of A. *Per Curiam* it doth not lie, for it cannot be a debt in the Executor, when it was no debt in the Teſtator. If a man covenant to pay 10 l. debt lieth againſt his Executor, but not when he covenanteth that his Executor ſhall pay 10 l [v].

If an Executor pleads *plene adminiſtravit*, the plaintiff may pray Judgment againſt him when Aſſets come unto him; but the plaintiff is to be barred, if he acknowledge it: and if he denieth, that he hath not fully adminiſtred, which is found againſt him, he ſhall be barred alſo, and pay coſts to the defendant. When it's found that the defendant hath ſome Aſſets, although of little value, ſo as he hath not fully adminiſtred; the plaintiff ſhall have judgment for the entire debt; but he ſhall not have execution but of as much as is found, and ſhall not be barr'd for the reſidue: and if more Aſſets come afterwards, he may have a *Scire fac.* to have execution thereof. But if it be found that he hath fully adminiſtred, or if it be ſo pleaded and confeſſed, the Judgment ſhall be againſt the plaintiff. And therefore *Mary Shiplies* caſe, lib. 8. fo. 134. that if an Executor plead *plene adminiſtravit*, the plaintiff may take Judgment preſently, and expect when he hath Aſſets, was denied to be law [*].

If an Executor of a Leſſee for years doth aſſign over his intereſt, an action of debt doth not lie againſt him for rent due after the aſſignment: and if a Leſſee for years aſſign all his intereſt and dies, the Executor ſhall not be charged for the rent due after his death; becauſe the perſonal privitie of contract, as to the action of debt, is determined [x].

Information in the Exchequer in nature of an account was brought againſt D. Executor of W. M. who had received mony of the Queen's amounting to 1500 l. upon ſpeciall verdict, the Caſe was, That W. M. had received annually out of the Exchequer 50 l. as a fee for his diet for 30 years, which was paid him by the command of the Lord Treaſurer, who had authority by Privie Seal to make allowance and payment of all fees due; but in truth theſe were not any due fees. The queſtion was, whether his Executors ſhould be charged. *Per Curiam*, they ſhall be charged: for this payment by the Lord Treaſurer's appointment was not allowable; for the Privy Seal is not ſufficient authority to diſpoſe of the Queen's Treaſure, unleſs where it is due; and he diſpoſing of it otherwiſe, it is out of his authority [y].

[t] T. 37 Eliz. C. B. *Snellings* caſ. Cooke lib. 5. fo. 82. b Crok part 3. fo. 409. n. 21.

[v] P. 33 Eliz. *Perrot* verſ. *Auſtin.* Crook part 3. 232.

[*] M. 9 Car. rot. 373. *Dorcheſter* verſ. *Webb.* Crook part 1. fo. 373. 8 E. 4. 3. Sir *John Needhams* caſ. lib. 8. fo. 136. 11 H. 7. 4. 21 H. 7. 31. 11 H. 4. 83. 20 E. 4. 17.

[x] C. lib. 3. fo. 24. *Walkers* caſe.

[y] H. 39 Eliz. *Dodingtons* caſe. Crook part 3. fo. 545. C. lib. 11. fo. 90. b.

Scire fac. was ſued by H. againſt W. Executor to his Father, for Execution of a Judgment obtained againſt the Teſtator; the defendant pleaded *plene adminiſtravit* at the time of the bringing of the action; and thereupon they were at iſſue: *per Curiam* it is no good plea, but the Executor ſhould have pleaded, there was nothing in his hands at the time of the Teſtator's death, becauſe the Judgment bound him to ſatisfie that debt before others; but by joyning of iſſue the advantage of that exception to the plea is waved [z].

[z] H. 11 Jac. rot. 1963. Moores rep. fo. 858. n. 1178.

Scire fac. againſt Executors, upon a Judgment againſt their Teſtator in debt; they plead, that before they had any conuſance of this Judgment, they had fully adminiſtred all their Teſtator's goods in paying of debts upon obligation: *ſur demurrer*, adjudged for the plaintiff, and that it was no good plea; for they at their peril ought to take conuſance of debts upon record, and ought firſt of all (unleſs for debts due to the Queen, wherein ſhe hath a prerogative) to ſatisfie them: and though the recovery was in another County then where the Teſtator and Executors inhabited, it is not material. But if an action be brought againſt them there where they inhabit, and before their knowing thereof, they pay debts upon Specialties; that is allowable [a].

[a] 4 H. 6. 8. 21 E. 4 21. M. 42 & 43 Eliz. rot. 627. *Littleton* verſ. *Hibbins*. Crook part 3. fo. 793.

Debt againſt B. as Executor; he pleads *plene adminiſtravit*; and it was found by verdict, that the defendant's wife was made Executrix, and ſhe by fraud, to deceive the Creditors, made a gift of her goods before marriage with the defendant; and yet ſhe retained them in her poſſeſſion, and took to husband the defendant; the wife dies, and the defendant had in his hands ſo many of the goods as would ſatisfie the Creditors their debts. Judgment for the plaintiff; for the defendant had by his plea confeſſed himſelf to be Executor; and for that he is chargeable, becauſe the property of the goods did not paſs out of the wife by her grant, the ſame being made by fraud, and ſo void by the Stat. 13 Eliz [b].

[b] H. 37 Eliz. rot. 1011. *Watſons* caſ. Moores rep. fo. 396. n. 518.

Debt againſt an Adminiſtratrix upon a bond of 600 l. made by the inteſtate; the defendant pleaded, that the inteſtate and his ſon acknowledged a recogniſance to the King of 100 l. and another of 800 l. to B. and another of 100 l. to M. and divers others, over and above which ſhe had not Aſſets; and after ſaid ſhe had not ſufficient Aſſets: the plaintiff replied, that the recogniſance to B. was for 400 l. which is paid, and the other to M. was for performance of Covenants, none whereof is broken, and that the recogniſance ſtands in force by Covin of the defendant. It was reſolved, 1. that the bar was inſufficient, for that firſt ſhe confeſſed it, that ſhe had ſufficient Aſſets to pay the ſaid recogniſances, and afterwards denied it. 2. Her plea is too general, but ſhe ought to have ſet forth how much Aſſets ſhe had, becauſe ſhe had knowledge of them: alſo, the bar is inſufficient, becauſe the inteſtate was bound in the recogniſance with another, and the defendant hath not averred that the other had not ſufficient to have ſatisfied them [c].

[c] C. lib. 9. fo. 109. *Treſham's* caſe.

§. III.

§ III. What is to be considered of the Executor, desirous to be resolved whether it were better to accept, or to refuse the Executorship.

1. *Divers things to be considered of him which would be resolved whether it were better to accept, or to refuse the Executorship.*
2. *The first thing to be inquired in this case concerning the Testator.*
3. *Of the authority and charge of the Executor.*
4. *The Executor may not meddle with the Lands, Tenements or Hereditaments of the Testator, but the Heir.*
5. *The Heir hath not to deal with the Goods and Chattels of the Testator, but the Executor.*
6. *The Testator may give power to his Executor to sell his Lands for payment of his debts, or other purpose.*
7. *What if some of the Executors named do refuse? whether may the rest sell the Lands according to the Testament?*
8. *Whether the Executor of him that had Lands in fee-simple, fee-tail, or for term of life, may recover the rents, fee-farms, or other arrerages, against the Tenant, which ought to have paid the same in the life of the Testator.*
9. *The second thing to be enquired concerning the Testator.*
10. *Of the authority and charge of the Executor of an Executor.*
11. *Whether divers being assigned Executors, whereof some be dead, the Executor of the Executor deceased may be joyned in Action with the Executor surviving.*
12. *Of the authority and charge of the Executor of an Administrator.*
13. *What is to be considered about the last Will of the Testator.*
14. *Whether the Executor may convert the residue to his own use.*
15. *Whether he that is named Executor shall lose his Legacy, if he do refuse the Executorship.*
16. *What is to be considered in the person of the Executor.*
17. *What is to be considered of a Wife Executrix.*
18. *What is to be considered in the person of the Co-executor.*
19. *Whether one Executor may prejudice another.*
20. *Whether one Executor may sue another.*
21. *Whether one of the Executors may alone sell the goods of the Testator.*
22. *Whether the Co-executor, after refusall, may meddle as Executor.*
23. *What is to be considered in other persons with whom the Executor is to deal.*

HE (1) that is desirous to be resolved whether it were better for him to undertake the Executorship, or to refuse the same, must consider divers things; whereof some concern *the Testator*, and some concern *the persons of others* [a].

[a] Hæc & alia quæ ab executore deliberande considerandæ sunt, traduntur à Jo. de Canib. in tract. de executor, ult. vol. 2. part. q. 1. cum seq. Cui, si placeat, adjungas Sichar. in Rub. de jure delib. C.

Of those things which concern *the Testator*, the first and principall thing to be regarded in this consultation is his substance or wealth.

First of all therefore, (2) it behoveth him that is named Executor, to enquire diligently, and to learn certainly, (if he can) what goods and chattels did belong to the Testator at the time of his death [b], and what debts were then due unto him; and on the contrary, what debts he the said Testator did owe unto other men [c].

[b] Sichar. in d. Rub. de jure delib. C.

[c] Cujus rei utilitas statim subjicitur.

For (3) as the Executor may enter to all the goods and chattels which did belong unto the Testator [d], and were in his possession at the time of his death *, and hath Action against every debtor of his Testator [f]: so shall every one to whom the Testator was indebted have Action against the Executor, (specially having an Obligation or other Specialty,) so far as the goods of the Testator will extend [g], and so long as the Executor hath Assets in his hands [h]. Howbeit, where any debt is due to the Testator, this shall not charge the Executor as Assets, because it is a thing in action, and not in possession [i]. Which conclusion is very reasonable, whenas the Executor hath used such diligence for the recovery thereof, that he cannot be justly charged or worthily blamed for not having the same in his own hands [k].

[d] L. cum hæredes. de acquir. poss. L. hæreditas. de reg. jur. ff. Plowd. in cas. inter Greisb. & Fox.

* Cagnol. in L. in. precibus. C. de impub. & aliis sub. n. 278.

[f] Instit. de perpet. & temp. action. *Terms of law*, verb. Executor.

[g] L. fin. § fin. de jure delib. C.

[h] *Terms of the Law*, verb. Executor.

[i] Brook Abridg. tit. executor, n. 112.

[k] C. sine culpa. de reg. jur. 6. Quod si per eum stetit quo minus habeat, in eo casu est, ac si in manibus retineret. L. jur. civili. ff. de cond. & demon. Peckius in c. cum not. stat. de jure civili & can. de reg. lib. 3. c. 6. & 7.

As (4) for Lands, Tenements and Hereditaments of the Testator, they shall descend to his Heir, and shall not come to the Executor: for by the laws of this Realm, as (5) the Heir hath not to deal with the Goods and Chattels of the deceased [l]; no more hath the Executor to doe with the Lands, Tenements and Hereditaments [m]. Albeit where lands be devisable by Will, (whereof we have spoken before [n],) the (6) Testator may give power and authority to his Executor to sell the same lands, either for the payment of his debts, or for some other purpose [o], and the sale made thereof by the said Executor is good and lawfull [p]: insomuch that divers persons being named Executors by the Testator, though (7) part of the Executors named in any such Testament of any such person, making or declaring any such Will of any lands, tenements, or other hereditaments, to be sold by his Executors after

[l] Doct. & Stud. li. 1. c. 7. & c. 24. Idem li. 2. c. 10. & c. 12. *Terms of law*, verb. Executor.

[m] Doct. & Stud. ubi supr. Tract. de repub. Angl. li. 3. c. 6, 7.

[n] Supr. part. 3. § 1. cum sequentibus.

[o] Peckius tit. devise, fol. 104, 105.

[p] Pecki. cod. loco.

after the death of any ſuch Teſtator, do refuſe to take upon him or them the adminiſtration and charge of the ſame Teſtament and laſt Will, wherein they be ſo named to be Executors, and the reſidue of the ſame Executors do accept and take upon them the care and charge of the ſame Teſtament and laſt Will; it is enacted by the Statutes of this Realm, "That then all bargains and ſales of ſuch lands, tenements "and hereditaments, ſo willed to be ſold by the Executors of any ſuch "Teſtator, as well before the making of that Statute as after, made "or to be made, by him or them onely of the ſame Executors that ſo "do accept or have accepted, or taken upon him or them, any ſuch care "or adminiſtration of any ſuch Will and Teſtament, ſhall be as good "and effectuall in Law, as if all the reſidue of the ſame Executors "named in the ſaid Teſtament, ſo refuſing the adminiſtration of the "ſame Teſtament, had joyned with him or them in making of the "bargain and ſale of ſuch lands, tenements, or other hereditaments, ſo "willed to be ſold by the Executors of any ſuch Teſtator, which be-"fore that time had made or declared, or that after ſhould make or "declare, any Will of any ſuch lands, tenements, or other heredita-"ments, after his deceaſe to be ſold by his Executors, as may ap-"pear by the Statute in that behalf made. Howbeit it is provided, "that the ſaid Statute ſhall not extend to give power and authority to "any Executor or Executors, at any time after, to bargain or to put "to ſale any lands, tenements and hereditaments, by virtue and autho-"rity of any Will or Teſtament made before the ſaid Statute, other-"wiſe then they might doe by the courſe of the Common law, afore "the making of the ſame.

Beſides that, ſuppoſing the caſe were ſuch, as the lands being deviſable, the Executors had power by Teſtament to ſell the ſame land, and to diſtribute the profits *in pios uſus*: yet after the death of the Teſtator, the inheritance ſhall deſcend unto the heir, and ſhall remain in him, untill the Executor have ſold the ſame [r]. And if the Executors themſelves do enter into the lands, after which entry ſome man offereth a ſum of mony or price of the ſame land, and the Executors refuſe to take the mony offered, becauſe the mony offered is under the value of the land, and the Executors intend to ſell the ſame dearer, and ſo keep the land in their own hands by the ſpace of one, two, or three years, converting in the mean time the profits ariſing forth of the ſame land to their own proper uſe: in this caſe the heir of the Teſtator deceaſed may enter to the Lands, and put out the Executors †.

[r] Perkins tit. deviſes, fol. 104, 105. Inſt. part 1. fo. 113. a.

If a man deviſe by his Will, that A. B. and C. D. whom he makes his Executors, ſhall ſell his land for payment of his debts, and they refuſe to be his Executors; yet nevertheleſs they may ſell his land, becauſe they are named by their proper names [t]: but if he had deviſed, that after the death of his wife his land ſhould be ſold by his Executors with the aſſent of A. B. and maketh his wife and a ſtranger his Executors, and dieth, and the wife dieth, and the ſaid A. B. alſo: in this caſe the authority of ſelling the land is determined and extinct by the death of A. B. without whoſe conſent it cannot be ſold [v]: and therefore if the ſurviving

† Perkins ubi ſupra; Brook Abridg. tit. deviſe, n. 19. 38 E. 3. Aſſ. pl. 3. Lit. S. 383.

[t] Fulb. l. 1. paral. fol. 41.

[v] Fulb. ubi ſupra. Dyer fo. 21. 9.

surviving Executor should sell the Land so devised, the sale is not good in Law, for want of sufficient authority [z]. But if the Testator seised of divers Manors, Lands and Tenements in socage tenure, by his last Will in writing shall devise all his said Manors, Lands and Tenements to his sister, and to her heirs for ever, except his Manor of R. which he doth appoint to pay his debts, and maketh two Executors by name, and dieth, and afterwards one of the Executors dieth, and the other Executor taketh upon him the Executorship, and afterwards selleth the said Manor of R. for a certain sum of money (for the purpose above mentioned) in fee: the sale in this case is holden for good, according to the intention of the Testator, for the speedy payment of his debts [y]. And where it is said, that if the Executors, having power to sell the Land of the Testator, defer the sale thereof, after the offer of a reasonable price, converting the profits thereof to their own use, there the Heir may lawfully enter to the Land, and put out the Executors; this is true, where the Executors have no farther authority or interest, but onely to sell the land, and to distribute the mony, taking for the same according to the Will of the deceased; for in this case the franck-tenement doth descend to the Heir. But if the Testator by his Will in writing devise and give his Lands to his Executors, which he willeth to be sold, and the money to be distributed *in pios usus*: in this case the franck-tenement is in the Executors after the death of the Testator, and not in the Heir [z]. And so in this case the Heir cannot enter, as he might in the former.

[z] In hanc sententiam descendebat tota Curia, inquit D. Dyer loco supradicto; quam alii sequuti sunt, ut per Fulb. ubi supr.

[y] Dyer fo. 371. n. 3. Fulb. ubi supra, fo. 45.

[z] Kellway lib. relat. fol. 107, 108. n. 25. ubi etiam refert quod in hac facti specie executor executoris potest vendere terras ita relictas: de qua tamen quæstione consulas velim alios Jurisperitos; nam regulariter executor executoris non potest vendere terras, alias per primum executorem Testatoris vendibiles. Brook tit. exe. n. 3. & infr. eod. §. n. 11. in fin. Cujus rei ratio est, quia mortuo executore, officium suum non transit in hæred. videturenim ipsius industria & amicitia electa. Clos. in c. religios. de testa. lib. 6.

In all cases of devises of lands to Executors to sell the same, it is most prudential to make it as clear and certain as may be, (that is) that the Executors, or the survivor of them, or such or so many of them as take upon them the probate of the will, (if his intent be so) shall sell [a]. And it's safer onely to give an authority, then an interest; unless his meaning be, that they shall take the profits of the land untill the sale: and if he doe so, then it's requisite that he appoint that the mean profits, untill the sale, shall be Assets in their hands; for otherwise it shall not be so [b].

Nota, where a man deviseth his land to be sold by his Executors, it's all one as if he had devised his land to his Executors to be sold: and the reason is, because the devise breaketh the descent [c].

A man seised in Fee of a Messuage, with which certain lands have been occupied time out of mind, giveth instructions for the making of his will, and, *inter alia*, declares, that his meaning is, that his said messuage and all his lands in W. shall be sold by his Executors; and the partie which writes the will pens it in this manner, *viz.* I will that

[a] Inst. part 1. fo. 113. a.

[b] Brownl. part 1. fo. 54. part 2. 47. 100.

[c] Instit. part 1. fo. 236. M. 10 Car. B. R. *Barnes* cas. Jones rep. fo. 352.

that my houſe with all the appurtenances ſhall be ſold by my Executors; the deviſor dieth, the Executors ſell part of the lands: this ſale is good, and the lands do paſs; for the words [*with all the appurtenances*] are effectuall to enforce the deviſe, and extend to all the lands, eſpecially becauſe the deviſor gave inſtructions accordingly [d].

A. deviſeth that his Executors ſhall ſell his land, and of the mony coming ſhall give ſuch a portion to his daughters: it is no Legacy, becauſe out of land, and an Action of Account lieth, and no ſuit in the Spiritual Court *.

If a man deviſeth that his Executors ſhall ſell his land; by this Stat. if one refuſeth, the other may ſell; but the ſale cannot be made to him who refuſeth [f].

If a man deviſe lands to A. B. C. his Executors to be ſold, &c. and one of them dieth, the ſurvivors cannot ſell; becauſe of the joynt truſt repoſed in them. Inſt. part 1. fo. 113.

A. ſeiſed of lands in Fee deviſed the ſame in tail, and if the donee died without iſſue, that his ſaid lands ſhould be ſold by his ſons in law; one of his ſons in law died in the life of the donee, and after the donee died without iſſue, and then the ſurviving ſons in law ſold the land: adjudged that the ſale was good, becauſe they were named generally his ſons in law, and it could not be ſold by them all; and the words of the will are ſatisfied [g].

One deviſed houſes deviſable by cuſtom (the land was holden of the King) in tail, and if the donee died without iſſue, deviſed that the land ſhould be ſold by his Executors, and died; the deviſee died without iſſue: it was holden in that caſe, that although the land eſcheated to the King, yet the ſale made by the Executors ſhould deveſt the eſtate out of the King, without petition or *monſtrans de droit*, becauſe the vendee was in by the deviſor paramount the eſcheat [h].

A. by will deviſed, that his Executors ſhould ſell his land, and died; the Executors levied a fine thereof to F. for a certain ſum of mony; it was pleaded in a ſuit for the ſaid lands, *Quod partes ad finem nihil habuerunt:* it was a queſtion whether this was a good plea. *Per Anderſon* it is a good plea: but *Windham* and *Periam* Juſtices ſaid, that upon not guilty pleaded, the Conuſee might help himſelf by giving the ſpeciall matter in evidence, in which caſe the Conuſee ſhall be in not by the fine, but by the deviſe.

A. deviſeth that his Executors ſhall ſell a reverſion of certain lands of which he died ſeiſed; they ſell the ſame without deed; yet the ſale is good, becauſe that the vendee is in by the deviſe, and not by the conveyance of the Executors [i].

As (8) for rents due to the Teſtator, "by the order of the common Law "of this Realm [t], the Executors or Adminiſtrators of Tenants in fee- "ſimple, fee-tail, and Tenants for term of life, of rent ſervices, rent char- "ges, rent ſecks, and fee-farms, have no remedy to recover ſuch arrerages "of the ſaid rents, or fee-farms, as were due to thoſe Teſtators in their "lives; nor yet the heirs of any ſuch Teſtator, nor any perſon having

[d] H. 28 Eliz. *Higham* and *Hanwoods* caſ. Leon. fo. 34. 3 Eliz. Pl. Com. 210. *Sanders* and *Freemans* caſe.

* 5 Mar. Dy. 152. Contra, Dy. fo. 264.

[f] 27 H. 8. Bendloes rep. Inſt. part 1. fo. 113.

[g] M. 32 Eliz. rot. 1307. *Vincents* caſ. Inſt. part 1. fo. 113. a. M. 29 Eliz. B. R. *Bonifant* and Sir *Rich. Greenfields* caſ. Godbolt fo. 77.

[h] 49 E. 3. *Iſabel Goodcheaps* caſ. vouched in Sir *Hugh Cholmlies* caſ. C. lib. 2. fo. 53.

[i] 29 H. 6. Inſt. part 1. fo. 113. a. Hughs abridg. tit. deviſe, fo. 657.

[t] Vide ſtat. H. 8. an. 32. c. 37.

" the reverſion of his eſtate after his deceaſe, may diſtrain or have any " lawfull action to levie any ſuch arrerages of rents, or fee-farms, due " unto him in his life; by reaſon whereof the Tenants of the demain " of ſuch lands, tenements or hereditaments, out of the which ſuch " rents were due and payable, who of right ought to pay their rents " and farms at ſuch days and terms as they were due, did many times " keep, hold and retain ſuch arrerages in their own hands, ſo that the " Executors and Adminiſtrators of the perſons, to whom any ſuch rents " or fee-farms were due, could not have or come by the arrerages of " the ſame, towards the payment of the debts, and performance of the " Will of the ſaid Teſtator. For remedy whereof, it is enacted by " the Statutes of this Realm as followeth; *viz.* That the Executors " and Adminiſtrators of every ſuch perſon or perſons, unto whom any " ſuch rents or fee-farms are or ſhall be due, and not paid at the time " of his death, ſhall and may have an Action of debt for all ſuch ar- " rerages againſt the Tenant, or Tenants, that ought to have paid the " ſaid rent or fee-farm, ſo being behind in the life-time of their Teſta- " tor, or againſt the Executors and Adminiſtrators of the ſaid Tenants. " And alſo furthermore, it ſhall be lawfull to every ſuch Executor or " Adminiſtrator of any ſuch perſon or perſons, to whom ſuch rent or " fee-farm is or ſhall be due, and not paid at the time of his death, as " is afore ſaid, to diſtrain for the arrerages of all ſuch rents and fee-farms, " upon the Lands, Tenements, or other Hereditaments, which were " charged with the payment of ſuch rents or fee-farms, and chargea- " ble to the diſtreſs of the ſaid Teſtator, ſo long as the ſaid Lands, Te- " nements or Hereditaments, continue, remain, and be in ſeiſin or poſ- " ſeſſion of the ſaid Tenant in demain, who ought immediately to have " paid the ſaid rent or fee-farm ſo being behind to the ſaid Teſtator in his " life-time; or in the ſeiſin or poſſeſſion of any other perſon or perſons " claiming the ſaid Lands, Tenements and Hereditaments, onely by " and from the ſaid Tenant, by purchace, gift or deſcent, in ſuch like " manner and form as their ſaid Teſtator might or ought to have done " in his life-time: and the ſaid Executors and Adminiſtrators ſhall for " the ſame diſtreſs lawfully make avowry upon their matter aforeſaid. " Provided always, that this Act, nor any thing therein contained, " ſhall not extend to any ſuch Manor, Lordſhip or Dominion in *Wales*, " or in the Marches of the ſame, whereof the Inhabitants have uſed " time without mind of man, to pay unto every Lord or Owner of ſuch " Lordſhip, Manor or Dominion, at his or their firſt entrie into the " ſame, any ſum or ſums of mony, for the redemption and diſcharge " of all duties, forfeitures and penalties, wherewith the ſame Inhabitants " were chargeable unto any of the ſaid Lords Anceſtours or Predeceſ- " ſours, before his ſaid Entrie.

" And farther be it, &c. That if any man now hath, or hereafter ſhall " have, in the right of his wife, any eſtate of fee-ſimple, or fee-tail, or " fee-farm, and the ſame rents or fee-farms now be or hereafter ſhall be " due, behind and unpay'd in the wife's life; then the ſaid husband, " after the death of his ſaid wife, his Executors and Adminiſtrators,

ſhall

"shall have an Action of debt for the said arrerages, against the Te-
"nant of the demain, that ought to have payed the same, his Execu-
"tors or Administrators: and also the said husband, after the death of
"his said wife, may distrain for the said arrerages, in like manner
"and form as he might have done if his said wife had been living,
"and make Avowry upon his matter, as is afore said. And likewise
"it is, &c. That if any person or persons now have, or hereafter shall
"have, any rents or fee-farms for term of life or lives, of any other
"person or persons, and the said rent or fee-farm, now or hereafter,
"shall be due, behind or unpaid, in the life of such person or persons,
"for whose life or lives the state of the said rent or fee-farm did depend
"and continue, and if the said persons do die, then he unto whom the
"said rent or fee-farm was due in form aforesaid, his Executors or
"Administrators, shall and may have an Action of debt against the Te-
"nant in demain, that ought to have payed the same when it was first
"due, his Executors and Administrators, and also distrain for the same
"arrerages upon such lands and tenements, out of the which the said
"rents or fee-farms were issuing and payable, in such like manner and
"form as he ought, or might have done, if such person or persons, by
"whose death the foresaid estates in the said rents and fee-farms were
"determined and expired, had been in full life, not dead; and the
"avowry for the taking of the same distress to be made in manner and
"form aforesaid.

If one grant a rent out of his land for life, provided that it shall not charge his person, and the rent be behind, and the grantee dieth; in this case, the grantee's Executor may have an Action of debt for these arrerages of rent [a].

[a] Inst. part 1. fo. 146. a.

If any rent or arrerages of rent be due to one upon a grant of rent out of any land to him, or reservation of rent upon any estate made by him; in these cases his Executor may have an Action of debt for this rent, or he may distrain for it, so long as the land chargeable with the rent, and out of which it doth issue, is in his possession that ought to pay it, or any claiming by or under him [b].

[b] Lib. 4. fo. 50. *Andrew Ognells* cas. 9 H. 7. 17. 34 H. 6. fo. 20. 32 E. 3. tit. debt 9. 14 H. 6. 26. 9 H. 6. 43. F. N. B. fo. 121. C. 19 H. 6. 43.

An Executor in some cases may have his remedy by Action for the arrerages of rent, which the Testator himself in his life-time could not. For if a man grant a rent charge out of certain lands to another for life, with a Proviso in the deed, that the grantee shall not in any sort charge the person of the grantor, and the rent be behind, the grantee dieth, the Executors of the grantee shall have an Action of debt against the grantor, and charge his person for the arrerages in the life of the grantee, notwithstanding that Proviso; because the Executors have no other remedy against the grantor for the arrerages, for distrain they cannot, because the estate in the rent is determined, and the Proviso cannot leave the Executors without remedy [c].

[c] Dy. fo. 227. Inst. part 1. fo. 146. a. 9 H. 6. 53. a.

Tenant in dower makes a lease for years reserving rent, and takes a husband; the rent is in arrere; the husband dies: agreed by the whole Court, that his Executors shall have the rent [d].

[d] M. 3 E. 6. Moors rep. n. 25. fo. 7.

A rent charge was granted to the Teſtator for divers years, if he ſo long lived; in Replevin the Executors diſtrained, and avowed for the arrears: reſolved they could not diſtrain, for that the St. 32 H. 8. provides remedy onely by diſtreſs, where the Teſtator was ſeiſed of a rent to him and his heirs, or for life; for there was no remedy at Common law: but where the partie hath remedy at Common law by Action of debt, as the Executor hath in this caſe, he cannot diſtrain and avow *.

* P. 13 Car. B. R. *Turner* verſ. *Lee.* Crook part 1. fo. 471.

Secondly, (9) concerning the Teſtator, it ſhall be behovefull for thee that art deſirous to be reſolved, whether it were better to accept or refuſe the Executorſhip, to inquire and learn whether the ſame Teſtator were Executor or Adminiſtrator to any other perſon.

If he were Executor, then, by the Statutes of this Realm, thou, (10) being Executor of an Executor, ſhalt have Actions of debts, accounts, and of goods carried away of the firſt Teſtator, and execution of recognizances made in court of Record to the firſt Teſtator, in the ſame manner as the firſt Teſtator ſhould have if he were in life, as well of Actions of the time paſt, as of the time to come, in all caſes where judgment is not as yet given betwixt ſuch Executors [y]; but the judgement given to the contrary in times paſt ought to ſtand in its force. And on the contrary, the Executor of the Executor ſhall anſwer to others to whom the firſt Teſtator was indebted, as much as he ſhall recover of the goods of the firſt Teſtator, even as the firſt Executor ſhould doe if he were in full life. But the goods which did belong to the firſt Teſtator ſhall not be put in execution for the debt of the ſecond Teſtator †; which goods the Executor of the Executor ſhall have by relation of the firſt Teſtator, as immediately Executor unto him, and not by relation to the ſecond Teſtator, Executor to the firſt Teſtator [x]: and ſo the property which the ſecond Teſtator had by the ſaid relation is taken away, and is in ſuch caſe as if the ſecond Teſtator had never been Executor [y]. Howbeit, this is to be underſtood with this limitation, *viz.* if there be no Executor of the firſt Teſtator ſurviving. For (11) if the Teſtator did make divers Executors, whereof ſome be yet living, that Executor of the firſt Teſtator ſurviving, and the Executor of his Co-executor, cannot be joyned both together in one Action [z]: but the Executor of the firſt Teſtator ſurviving, he alone ſhall have Action againſt the debtors of the firſt Teſtator, and he alone ſhall be convented by them to whom the firſt Teſtator was indebted, and not both joyntly together [a]: for the Executor of an Executor hath not to deal with the goods of the firſt Teſtator in this caſe, that is to ſay, where there is another Executor of the firſt Teſtator ſurviving. Inſomuch that, where there be two Executors, whereof one maketh an

[y] Stat. 4 Ed. 3. an. 25. c. 5. Idem jure civili in hær. hæredis. L. 2. & 3. de petic. hær. ff. Contrarium in hærede execut. tam jure civili, quam Canonico. Bar. & alii in L. à filio, ff. de admen. leg. glos. in c. fin. de teſta. 6. verb. mortuo. 34 H. 6. 14. Lib. 5. fo. 9. *Brudnells* caſ. Fl. Com. fo. 86.

† Legatarios præferendos eſſe creditoribus hæred. videre eſt apud Sichardum in L. ſi decreto. c. cui po. in pig. n. 8.

[x] Plow. in caſu inter Bransby & Grantham. Atque ita ſolvitur nodus de quo Bar. & alii in L. veluti. ff. de petic. hær. utrum, viz. hæres hæred. ſuccedat priori teſtat. ex teſtamento, vel ab inteſtato: nobis enim intelligitur ſuccedere ex teſtam. utcunque non fuit in primo teſtamento nominatus, id quod diſputandi rationem præbuit.

[y] Plowd. ubi ſupra.

[z] Brook Abridg. tit. exec. n. 99. Contrar. in hæred. conſtituit jus civile, quo ſi aliquis ex hæred. deceſſerit, pluribus relictis hæred. hi omnes accipere debent illam partem quæ ad hæred. defunct. pertinuit familiæ herciſcundæ actione. L. ſi familiæ herciſc. eod. tit.

[a] Brook Abridg. tit. exec. n. 99.

Ex-

Executor and dieth, his Co-executor surviving, which Co-executor afterwards dieth intestate; yet in this case the Executor of the Executor may not meddle with the goods of the first Testator [b]: for so soon as the Executor which made his Testament died, (the other surviving,) his power was determined or finished by his death, and all the power did remain in the Co-executor surviving, who afterwards dying intestate, it is in the power of the Ordinary to commit the administration of the goods of the first Testator not administred, to the next of kin to the first Testator, and not to the Executor of that Executor which died first [c]. Much less may the Executor of the Executor meddle with the goods of the first Testator, when the Co-executor is yet living: and if he do, the Executor surviving may have an Action against him, for such goods as he hath of the first Testator [d]. And besides that, the Creditors of the first Testator may have an Action against the Executor of the Executor in this case, as Executor of his own wrong *.

[b] Brook Abridg. tit. execut. n. 149.

[c] Brook d. n. 149. & in tit. administ. n. 45.

[d] Brook tit. execut. n. 99.

* Brook eod. n. 99. 29. 21 E. 4. 22. 10 H. 6. 26. 41 E. 3. 30, 31.

And albeit the Executors, whilst they lived, did divide the goods of the Testator deceased amongst them, (unless the Testator did by his Will devise that the same should be so divided;) yet the Executor surviving may recover the same, notwithstanding the division amongst themselves, besides the Will of the deceased †. But what if the Testator make two Executors, whereof the one proveth the Will, and doth intermeddle as Executor, and the other refuseth; afterwards he which did prove the Will maketh Executors, and dieth? whether in this case may the Executors of the Executor sue for the debts due to the first Testator? or whether may the other Executor of the first Testator prove the Will, and sue for those debts? Wherein I am of their opinion who hold that the Executors of the Executor may recover the debt due to the first Testator [f]. For albeit the Executor of the first Testator might at his pleasure have administred as Executor, so long as his Co-executor lived; yet after his death it is not within the compass of his power so to doe; for his authority did die when his Co-executor died, by their opinion upon whose judgment I chiefly relie in the deciding of this question ‖. Insomuch that if the Executor who proved the Will had made no Executors, but had died intestate, yet the administration of the goods of the first Testator, not administred by the said Executor, is to be committed, as of one dying from that time intestate, to the widow or next of his kin, and not to the said Executor who refused to prove the Will, and would not administer as Executor whilst his Co-executor lived †. And the Executor of the Executor must answer to the Creditors of the first Testator, as much as he shall receive of the goods of the first Testator *. But if that Executor did alienate or convert to his own use all the goods which did belong to the former Testator; in this case no Action doth lie against the Executor of the Executor, for recovery of any debt due by the first Testator ‖. But where the Testator maketh one his Executor, and dieth, which Executor maketh another his Executor, and also dieth before he hath proved the Testament of the first Testator; in this case the administration of the goods of the first Testator shall not be committed to the Executor of the Executor, (neither is he Executor

† Id quod non semel accepi à juris regni nostri peritis. 27 H. 8. 21, 22. Brook tit. executor, pl. 7.

[f] Dyer f. 160. n. 42.

‖ Dyer ubi supra. (post D. Brook, summum tunc temporis Justiciariium hujus regni Angliæ.)

† Brook Abrid. tit. executor, n. 92. 99. & n. 149.

* Supr. eod. §. n. 19.

‖ Labridg. dez cases edit. an. Dom. 1596. tit. exec. f. 177. n. 3. Cui convenit Ro. Kelleway, l. relationum, fol. 99. n. 7.

ecutor to the first Testator,) but the administration shall be committed, with the Testament annexed, to his next of kin †; unless he did bequeath his goods, after his debts, funerals and legacies discharged, to the Executor named in his Testament: for in this case the administration of the first Testator's goods, with the Testament thereunto annexed, is to be committed to the Executor of his Executor *.

† Dyer f. 372. n. 8.

* Et hoc ex relatione reverendi Doctoris Drurie, Judicis Curiæ prærogativæ Cantuar. Cui reliqui Judices acquieverunt. Vide Dyer ubi supra.

Moreover, it is to be noted, that the Executor of an Executor cannot sell the Land of the first Testator, who by his Testament gave power to his Executor to sell the same [f]: for after the death of that Executor, the power ceaseth; unless divers being appointed Executors, some of them die, or refuse to prove the Will, for then the others surviving, or accepting, may sell the same, as is afore said.

[f] Brook tit. exec. n. 3. 27 H. 8. Bendloes rep. adjudged accord. Inst. part 1. fo. 113. a.

If (12) the party deceased, to whom thou art Executor, were not Executor unto another, but Administrator onely; thou art not to succeed in his place in the administration of the goods [g], but a new administration is to be granted of the goods not administred by the Administrator to the next of kin, not of the Administrator, but of him that died first [h].

[g] Fitz. Abridg. tit. Administr. n. 3.

[h] Fitz. ubi supra. Principall grounds, f. 61. pag. 2.

And so it is, if he to whom thou art Executor were Executor to another, but died before he had proved the Will, or administred any of his goods: for in this case Administration of his goods is to be committed to the Widow, or next of his kin, with the Will annexed; unless also he had bequeathed the residue of his goods unto his said Executor; for then the Administration of his goods is to be committed unto the Widow or next of kin of the Executor, and not of the Testator, as is afore said *.

* Supr. eod. §. n. 33.

Debt against the Executor of an Executor; the def. pleaded, that the Executor's Testator had fully administred, and that he had nothing in his hands at the time of his death; and it was found that he had Assets; whereupon a *Fieri fac.* issued to the Sheriff, and he returned that the def. had nothing: and it was held, that the Sheriff should be amerced, for he should not have made such a return; and that it should be no prejudice to the pl. for that the debt should be charged so long as the record remains in force not reversed by error or attaint; and if he hath no goods of the Testator's, he shall be charged of his own proper goods; for that when he pleaded that the first Testator had fully administred, he did not say, that Assets did not come to his hands after his Testator's death ‖.

‖ P. 3 Eliz. Moors rep. n. 8.

W. E. brought debt upon an Obligation by the name of W. E. *administrator bonorum & catallorum A. E. durante minori ætate* of J. E. Executor of the said A. E. Executor of R. E. *Per Curiam, en brevi de error* he hath no authority to meddle with the goods of the first Testator †.

† H. 33 Eliz. B. R. *Limour* verſ. *Every.* Crook part 3. fo. 10 E. 4. fo. 1. 27 H. 8. fo. 7.

There is yet (13) a farther consideration to be had of some things which seem to concern the Testator, not to be neglected by the Executor,

cutor, desirous to be resolved whether it were better to accept or refuse the Executorship; namely, the consideration of the last Will and Testament of the deceased, and of the Legacies and devises therein given. Wherein the Executor is not onely to consider, whether the Testator hath given more then the death's part doth extend unto, (in which case, what course is to be followed, is already elsewhere prescribed [i]:) but also in (14) case any thing do remain, the funerall, debts and Legacies discharged, the Executor may not think to convert the same to his own proper use [k], nor any more of the Testator's goods then is given to him by the Testator in his life-time, or by his Will, or which the Ordinary shall allow him for his labour, or in lieu of some debts due unto him by the Testator, or due by the Testator to some other person, and discharged by the Executor [l]. And (15) if after due admonition to him given, he refuse the Executorship, or to perform the Will, he shall lose his Legacy bequeathed unto him by the same Testator, although he were of kin, or allied unto the same Testator [m]. The reason is, because he is deemed unworthy the benefit, that refuseth the burthen [n]. Moreover, here the Executor doth what in him lieth to make the party deceased to die intestate [o]. But if the Executor be not admonished to undertake the office, then being the Testator's kinsman, or such a person to whom the Testator would have given the legacy, though he did not perform the Will, he doth not lose that legacy in not undertaking the Executorship [p]: neither shall the Wife lose her thirds, nor the Children their filiall portions, in refusing the Executorship [q]: much less shall the Creditor lose his debt due by the Testator.

[i] Supr. part. 3. § 17.

[k] Magna Charta c. 18. c. statutum. § statuimus. de testa. l. 3. provinc. const. Cant. Dominic. § Gem. in c. religios. de test. 6. n. 9. & Doct. & Stud. l. 2. c. 10. circa medium. Inst. part 2. fo. 32. 17 E. 3. 73. 27 E. 3. 88. 29 E. 3. 13.

[l] Text. in d. § statuimus. Dyer fol. 2. & fol. 310.

[m] Rom. cons. 207. & 235. cujus opinio communis est, ut per eand. cons. 235. & per Gribald. Thesaur. com. op. verb. tutor.

[n] C. qui sentit. de reg. jur. 6.

[o] Gribald. Thesaur.

[q] Auth. hoc amplius.

com. op. verb. tutor. [p] Jas. Alex. & Sichard. in L. si legatarius. C. de leg. c. de fidei commis. Novel. de hæred. & falcid. § siquis autem.

After the consideration of the estate of the Testator, he (16) that is named must also consider his own person, in whom many things ought to concur; but chiefly it is requisite that he be prudent, diligent, and faithfull [r]: wherein if there be any defect, I mean, if either he be ignorant, negligent, or unfaithfull, he is very like to find the office very troublesome, peradventure also discommodious †: unless there be certain hope, that being ignorant, he will use the advice of those that be skilfull; and that of a negligent person he will become diligent, easing himself also of such business as might hinder the expedition of this office; and that, howsoever he hath behaved himself in other affairs unfaithfully, yet in this office he will have an honest care, well and truly to discharge that trust committed unto him, always having before his eyes, not onely the forfeiture of his bond, by his unfaithfull dealing, together with the ignominie by deceiving the dead man's expectation, but also the danger of his soul by the breach of his oath: for he must be sworn to execute the Will, and to administer the goods well and faithfully [t].

[r] Jo. de Canib. Tract. de execut. ult. volunt. 2. particula, q. 1.

† Jo. de Canib. ubi supr.

[t] Hoc viridi observantia passim fit notorium, maxime infra provinciam Ebor.

It

It ſhall behove thee likewiſe in particular to conſider, whether thou be indebted to the Teſtator, or whether the Teſtator were indebted unto thee. In which caſe how far thou ſhalt be tied or diſcharged, thou mayeſt eaſily and clearly perceive by that which I have formerly written of the Debtor or Creditor made Executor *: whereunto I refer thee to be more fully inſtructed, whether it were better for thee to accept or to refuſe the Executorſhip.

* Supra parte 5. § 1. prope finem.

If (17) a wife during the coverture be named Executrix, there is this farther to be conſidered in her perſon, that ſhe alone cannot ſue for any debt due to the Teſtator, nor be ſued for any debt due by the Teſtator, without her husband [v]: but ſhe alone may doe any act extrajudiciall, as the paying of debts or legacies, or the receiving or releaſing of any debts due to the Teſtator [x]: (yea, the husband without the wife (though ſhe alone be Executrix) may doe any extrajudiciall act, as well as the wife Executrix [y].) And therefore if the husband releaſe or remit any debt due to the Teſtator, the ſame is good and available, not onely during the marriage, but alſo after the death of her husband [z]. But if the wife die, the husband cannot convert any of the goods and chattels belonging to the firſt Teſtator to his own proper uſe; for of ſuch goods the wife her ſelf may make a Teſtament, appointing an Executor, without the licence of her husband, as is before more fully declared [a].

[v] Brook Abridg. execut. n. 178.
[x] Brook eod. n. 178. Kelleway reports, fo. 127. n. 74.
[y] Fitzh. Abridg. tit. exec. n. 23. 40. Brook eod. tit. n. 147. 151. 152. D. Coke lib. 5. relat. in Ruſſels caſe.
[z] Fitz. & Brook ubi ſupr. quibus convenit D. Coke in Ruſſels caſe, quamvis contrarium teneat Rob. Kelleway, lib. relat. fol. 122.
[a] Supra 2. part. § 9.

Finally, concerning the perſons of others, with whom thou that art named Executor in the Teſtament haſt to deal, it behoveth (18) thee to have a ſpeciall conſideration of thy *Co-executor* [b], (if any be) leſt he be an overmatch for thee; that is to ſay, whether he be of more experience and greater wealth then thou art, and namely, whether he be a covetous and contentious perſon [c]. If he be, take thou good heed; for it is to be feared, that (19) he will keep all the goods from thee [d]; that he alone will receive the debts due to the Teſtator, and make them a releaſe: for this alſo he may doe *, (except it be after judgment.) Without doubt, if he be ſuch a perſon, he hath learned this leſſon, that (20) *one Executor cannot ſue another* for poſſeſſion of the Teſtator's goods [f]; becauſe, how many Executors ſoever they be, they are all but as one perſon, and no man can ſue himſelf [g]; and ſo the poſſeſſion of one is as the poſſeſſion of another [h]: and hereby thou ſhalt remain without remedy, unleſs it be for a Legacy left unto thee alone [i], or unleſs thou maieſt have ſome ſlender remedy before the Ordinary [k]. It is alſo very likely that he alone (21) will ſell the Teſtator's goods; in which caſe he alone will and may ſue for the money due for the ſame [l]: but if there be any debt due to be payed in the behalf of the Teſtator, then look aſſuredly that thou ſhalt be ſued as well as he [m]; howſoever Execution may paſs againſt him alone which hath the goods [n]. To conclude, if thy Co-executor be ſuch a perſon as is afore ſaid, an hundred to one he will not ſuffer thee to partake of the commodity, but of the trouble thou ſhalt not avoid but be partaker.

[b] Jo. de Canibus Tract. de exec. ult. vol. particula 2. q. 1. n. 17.
[c] Jo. de Ca. d. 1, q. n. 18.
[d] Brook Abridg. tit. exec. n. 98.
* Brook tit. exec. n. 37. Dyer fol. 319.
[f] Brook eod. tit. n. 98.
[g] Arg. c. debitum. de baptiſ. extr. L. præter. ff. de tut. & cur. dat. ab his. Plowd. in caſu inter Par. & Yardley, fol. 343.
[h] Fitz. tit. exec. n. 32.
[i] Brook tit. exec. n. 104.
[k] Brook eod. tit. n. 37.
[l] Brook tit. exec. n. 66.
[m] Supr. part. 4. § 20.
[n] Brook tit. exec. n. 16.

This alſo is not to be omitted, that (22) if thy Co-executor do refuſe the Executorſhip before the Ordinary, and thou alone doſt prove the

the Teſtament, yet may he afterwards (ſo long as thou liveſt) adminiſter the goods, or remit the debts due to the Teſtator [o], and thou canſt not hinder him; neither canſt thou recover againſt the perſons by him ſo releaſed [p]. After (23) conſideration of thy Co-executor, there is regard alſo to be had to the reſt of thoſe perſons with whom thou art to deal, *viz.* to the Creditors and Legataries, and to the payment of debts; for debts are to be payed before Legacies [q]: and of debts, ſome are to be preferred and ſatisfied before others, and likewiſe of Legacies, as elſewhere [r] hath been and † ſhall be ſhewed. Otherwiſe it may come to paſs that the Executor ſhall be forced to pay out of his own purſe, after he hath ſpent all the Teſtator's goods and chattels [t].

[o] Brook tit. exec. n. 38. Dyer fol. 160.

[p] Brook eod. tit. n. 37. & n. 117.

[q] L. ſcimus. C. de jure delib.

[r] Supr. part. 3. § 17.

† Infr. ead. part. § 16.

[t] D. ſcimus. Doct. & Stud. lib. 2. c. 10.

By the due conſideration of thoſe things, *viz.* firſt, of the eſtate or condition of the Teſtator, ſecondly, of his own eſtate, and thirdly, of the Co-executor or other perſon with whom he is to have any dealing, it is not hard, in my opinion, for the Executor to collect whether it is likely to be beneficiall or hurtfull, to accept or refuſe the Executorſhip, and to reſolve accordingly; at the leaſt if hereunto he alſo take a view of thoſe things which do appertain to the office of an Executor, accepting the Executorſhip hereafter deſcribed [v].

[v] Infr. ead. part. § 5. cum §§ ſequentibus.

§ IV. Of the time which the Executor hath to conſult, whether he will undertake or refuſe the Executorſhip.

1. *The time of deliberation arbitrarie.*

THe time (1) wherein he that is named Executor in the Teſtament is to deliberate and determine, whether he will accept or refuſe the Executorſhip, is uncertain, and left to the diſcretion of the Ordinary [a], who uſeth at his pleaſure, and when he will, not onely within the year [b], but within a month or two, to cite him that is named Executor, to accept or refuſe the Executorſhip.

[a] Legatin. libertat. de exec. teſta. & ibi Jo. de Athon. verb. approbatam conſuetudinem.

[b] Quod vero annus deliberandi jure Civili conceditur, (L. cum in antiquioribus. C. de jure delib.) illud ita intelligendum, ubi hæres non confecto inventario tenetur ultra vires hæreditatis. Siquidem non tenetur hæres inventarium facere, ſi juri tantum civili attendamus, (L. ſcimus. § fui. de jure delib. C. & ibidem Sichard.) dummodo velit ſubire periculum ſolvendi univerſa defuncti debita. Sed jure Legatin. quo nos communiter utimur, executor tenetur præciſe ad confectionem Inventarii, nec tenetur ultra vires bonorum. Quare ſublata cauſa, id eſt, periculo ſolvendi debita ultra vires bonorum defuncti, per confectionem inventarii, quam non poteſt evitare, (ut infra eadem parte § 6.) ſublata (inquam) cauſa, tollitur effectus, id eſt, annuale tempus deliberandi, num velit huic periculo ſeipſum ſubjicere. Nam executores, quoad confectionem inventarii, tutorum potius quam hæredum naturam ſapiunt. Lind. in c. ſtatutum. § inhibemus. de teſta. L. 3. provincial. conſtit. Cant. verb. prius.

§ V. Of the office of an Executor testamentary undertaking the Executorship.

1. Wherein the office of an Executor doth principally consist.

IT (1) appertaineth to the office of an Executor Testamentary here in *England*, accepting the Executorship, (amongst other things [a]) to cause an Inventory to be made [b]; to procure the Will to be proved and approved [c]; to pay the Testator's debts and legacies [d]; and finally, to make an account *.

[a] De quibus consulas velim Jo. de Canib. Tract. de executor. ult. vol. part. 2. q. 1. n. 26. ubi decem enumerat executoris officio incumbentia. [b] Ut infra cad. part. §§ 6, 7, 8, 9, 10. [c] Ut infr. cad. part. §§ 11, 12, 13, 14, & 15. [d] Infra § 16. * De quo infra cad. part. §§ 17, 18, 19, 20, 21.

§ VI. Of divers questions about the making of an Inventory: and first, Whether it be of necessity that an Inventory be made.

1. *By the laws Ecclesiasticall of this Realm, and Statutes of the same, an Inventory is necessary.*
2. *The Executor which presumeth to administer the goods, and refuseth to make an Inventory, may be punished.*
3. *The reason of this necessity.*

CONcerning the making of an Inventory, it is expedient to understand, whether it be simply necessary that an Inventory be made; what things are to be put into the Inventory; within what time the Inventory is to be made; in what manner; and what be the effects of an Inventory.

That (1) an Inventory is necessary to be made by an Executor testamentary, is evident, as well by the Laws Ecclesiasticall of this Realm [a], confirmed by continuall use; as also by the Statutes [b] of the same: neither (2) ought the Executor to meddle with the goods of the deceased, before he make an Inventory [c]. And if any Executor refuse to make an Inventory, and nevertheless presume to administer the goods of the deceased, he may be punished at the discretion of the Bishop or Ordinary [d].

The (3) reason is, lest the Executor being disposed to deal unfaithfully, should defraud the Creditors or Legataries, by concealing the goods of the deceased *.

[a] Legatin. libertat. tit. de. executor. testam. c. statutum. § inhibemus. li. 3. provincial. const. Cant. [b] Stat. H. 8. an. 2. c. 5. [c] D. § inhibemus. [d] Legatin. libertat. de execut. testa. * Francis. Porcellin. tract. de inventario, q. 2. Per. § sanctimus. de hæred. & fal. in Auth.

§ VII.

§ VII. What things are to be put into the Inventory.

1. *All goods, chattels, wares, merchandiſes, movable and immovable, are to be put into the Inventory.*
2. *Leaſes are to be put into the Inventory.*
3. *Corn on the ground is to be put into the Inventory.*
4. *Graſs or Trees growing are not to be put into the Inventory.*
5. *Whether ſuch things as are affixed to the Freehold ought to be Inventoried.*
6. *Whether Debts are to be put into the Inventory.*
7. *Whether money due for land is to be put into the Inventory.*

THe (1) things that are to be put into the Inventory, are all the goods and chattels and rights which were the Teſtator's, or did belong, or were due unto him at the time of his death, whether they be movable or immovable, corporall or uncorporall [a]. Whereunto alſo agree the Statutes of this Realm, whereby it is enacted, that a true and perfect Inventory be made of the goods, chattels, wares, merchandiſes, as well movable as not movable, whatſoever, that were of the perſon deceaſed [b]: and therefore (2) Leaſes ought not to be omitted forth of the Inventory [c], how many ſoever they be.

[a] Franciſ. Porcellin. tract. de inventar. q. 3. Pract. Petr. de Ferrar. de forma libelli quo agitur ad reddendam rationem tutel. Sichard. in § ſin autem. L. fin. C. de jure delib. n. 9.

[b] Stat. H. 8. an. 21. c. 5.

[c] Cattalla etenim ſunt realia. *Terms of Law*, verb. Chattels.

Likewiſe (3) Emblements, or Corn growing upon the ground, ought to be put into the Inventory, ſeeing they belong to the Executor [d]: but (4) not the Graſs or Trees ſo growing, which belong to the heir *; nor (5) things that are affixed to the Tenement, and are made parcel of the Free-hold; ſuch I mean as belong likewiſe to the heir, and not to the Executor [f].

[d] Perkins tit. deviſe, fol. 99. & hanc opinionem longævus comprobavit uſus, quicquid dicat Sichard. poſt Angel. in d. § ſin autem.

* Perkins ubi ſupr.

[f] L. acceſſorium. de reg. jur. 6. huc facit L. cætera. de leg. 1. ff. in princ.

And therefore the Glaſs annexed to the windows of the houſe, becauſe it is parcell of the houſe, ſhall deſcend as parcell of the inheritance to the heir, and the Executors ſhall not have it *. And although the leſſee himſelf, at his own coſt, do cauſe the glaſs to be put into the windows; yet the ſame being once parcell of the houſe, he cannot take the ſame away afterwards, without danger of puniſhment for waſte †. Neither is there any materiall difference in law, whether the glaſs were annexed to the window with nails, or in other manner, either by the Lord, or by the Tenant; for being once affixed to the Free-hold, the ſame cannot be removed by the Leſſee, but ſhall belong to the Heir, and not to the Executors, as is afore ſaid ‖; and therefore

* D. Coke lib. 4. relationum, in Herlakendens caſe, in fin. fol. 63, 64.

† Ibidem.

‖ Ibidem.

the ſame is not to be put into the Inventory, as part or parcell of the goods of the deceaſed. The like may be concluded of Wainſcot, that it ought not to be put into the Inventory, as parcell of the goods of the deceaſed; for being annexed unto the houſe, either by the leſſor or by the leſſee, it is parcell of the houſe*. And there is no difference whether it be affixed with great nails, or little nails, or by ſcrews, or irons thruſt through the poſts or walls of the houſe; for howſoever it be affixed, either in manner aforeſaid, or in any other manner, it is parcell of the free-hold, and if the Executors ſhould remove it, they are puniſhable for the ſame†. And not onely glaſs and wainſcot, but any other ſuch like thing, affixed to the free-hold, or to the ground, with mortar and ſtone, as Tables dormant, Leads, Bayes, Mangers, &c. for theſe belong to the Heir, and not to the Executor‖: and therefore they are not to be put into the Inventory of the goods of the deceaſed. Nevertheleſs the Box enſealed, or the Cheſt with evidences of the Land, though the ſame be not affixed to the free-hold, yet becauſe they contain thoſe things which belong to the Heir, they alſo belong to the Heir, and not to the Executors: and therefore they are not to be put into the Inventory of the deceaſed's goods*. And ſo it is of Fiſhes in the ſtagns or ponds, and of Doves in the Dove-cote, ſituate within the grounds belonging to the heir; for in this caſe the Fiſhes in thoſe ponds and the Doves belong to the heir, and not to the Executor: and therefore they are not to be put into the Inventory of the goods of the party deceaſed†. What ſhall we ſay to thoſe goods which may ſeem to belong to the Wife, rather then to the Husband, as her apparell, her bed, her jewels, or ornaments for her perſon? whether are they to be put into the Inventory of the Husband's goods, yea or nay? By the Civill Law thoſe goods belonging to the wife, which be called *Bona paraphernalia* ‖, are not to be put into the Inventory of her Husband's goods, neither are they ſubject unto the payment of the Husband's debts*. But whether the Wife's apparell, with her bed, jewels, and ornaments for her perſon, be comprehended amongſt thoſe goods which the Law calleth *Bona paraphernalia*, is the matter in queſtion. And it ſeemeth rather that they are not, (her convenient apparell, agreeable to her degree, onely excepted†:) Otherwiſe whatſoever goods belong to the Wife, are preſently, by virtue of the marriage celebrated betwixt them two, become the Husband's, the property thereof being changed and transferred from the wife to the husband*. Inſomuch that without her husband's licence or conſent, ſhe cannot diſpoſe thereof, neither by act in her life-time, nor at her death by her laſt Will; which ſhe might doe if they were *Bona paraphernalia*†. Wherefore theſe goods being the Husband's, and not the Wife's, and the property thereof being in him, and not in her; and conſidering withall, that by the Statutes of this Realm of *England*, it is enacted and eſtabliſhed, that the Executors ſhall make or cauſe to be made a true and perfect Inventory of all the goods, chattels, wares, merchandiſes, as well movable as not movable, whatſoever, that were of the perſon deceaſed, and the ſame ſhall cauſe to be indented, &c. (as by the ſaid Statute more at large

* D. Coke ubi ſupra. Quamvis jure civili, quæ ornatus gratia magis quam perficiendi domum ponuntur, ædium partes non ſunt. De qua re vide Rebuff. & DD. in L. pen. de verb. ſig. ff.

† D. Coke ubi ſup.

‖ Rob. Kelleway lib. relation. fol. 88. n. 2. Labridg. dez caſes, tit. execut, fol. 181. n. 4.

* Labridg. dez caſes edit. ann. Dom. 1599. tit. execut. fol. 181. n. 4. Non abſimile eſt quod jus civile ſtatuit in tabula; quippe quæ cedit picturæ. Ridiculum enim eſt, picturam Apellis vel Parrhaſii in acceſſionem viliſſimæ tabulæ cedere. Inſt. de rer. deviſ. § ſi quis in aliena.

† R. Kelleway lib. relationum, fol. 118.

‖ L. hac lege. & L. fin. de pactis convent. ſup. dote. C.

* L. ob maritorum. ne ux. pro marit. C.

† Dyer fol. 166.

* Supr. eod. l. par. 2. § 9. n. 11.

† Lindw. in C. ſtatut. de teſta. l. 3. provinc. conſt. Cant. § cæterum. verb. propr. uxorum. Per d. L. hac lege. & L. fin. C. de pact. convent. ſuper dote.

at large appeareth ‖:) It may be concluded, that in conſtruction of Law, thoſe goods above mentioned, and namely the wife's jewels, chains and borders, are to be put into the Inventory of the deceaſed husband's goods *. And yet notwithſtanding, if we ſhall reſpect what hath been uſed and obſerved, ſuch hath ever been the generall and ancient cuſtome, or rather courteſy, of the Province of *York*, as thereby widows have been tolerated to reſerve to their own uſe, not onely their apparel, and a convenient bed, but a coffer, with divers things therein neceſſary for their own perſons; which things uſually have been omitted out of the Inventory of their deceaſed husband's goods †. Unleſs peradventure the husband were ſo far indebted, as the reſt of his goods would not ſuffice to diſcharge the ſame. In which caſe, the wife's jewels, chains and borders, and ſuch like, being things of decency or ornament, and not of neceſſity, have been uſually prized, and put into the Inventory amongſt other goods of the deceaſed, towards the payment of his debts. And ſo they ought to be ‖.

‖ Sta. H. 8. an. 21. c. 5.

* D. ſtat. H. 8. an. 21. cap. 5.

† Quemadmodum & in aliis quibuſdam regnis obſervatur, teſte Jo. Garſia, tract. de expenſis, fol. 182.

‖ Per d. ſtat. H. 8. an. 21. c. 5. adverſus quod ſuperveniens conſuet. parum valet.

The (6) debts due to the Teſtator are to be put into the Inventory g. But the debts due by the Teſtator, they need not to be put into the Inventory h. And if any ſuch debts be put into the Inventory, the Ordinary ſhall doe well to make diligent examination, whether the Teſtator did owe any ſuch: for many times debts are thruſt into the Inventory, which are not due by the Teſtator, and ſo the Legataries and children of the deceaſed are often defrauded, at leaſt of ſome part of their due, by the unfaithfulneſs of the Executor, and negligence of the Ordinary or his Officer.

g Gloſ. in L. chirographh. ff. de adminiſt. tut. Quod verum quidem eſt, ſi exiſtant inſtrumenta; alias non requiritur ut inſcribantur, donec recuperentur, & in manibus tractentur, ut quæ interim non recte dicantur reperta. Lind. in d. c. ſtatut. § inhibemus. verb. bonis. Pract. Ferrar. forma libelli ad reddendam rationem tut. § in ſuo. n. 13. Æquum tamen eſt, ut aliqua fiat commemoratio hujuſmodi creditorum, utut incertorum, ne ſublata penitus eorum memoria, decepti maneant defuncti creditores, liberi, legatarii, vel alii intereſſe habentes in ea parte.

h Lind. in d. c. ſtatut.

Lands, tenements and hereditaments, with the appurtenances, ſuch I mean as do not belong to the Executor, but deſcend to the Heir, are not to be put into the Inventory: inſomuch that (7) if the Teſtator will by his Teſtament or laſt Will, that the ſame lands be ſold; in this caſe, by the Statutes of this Realm, neither ſhall the money thereof coming, nor the profits of the ſaid lands for any time, be accounted as any of the goods or chattels of the perſon deceaſed i; and conſequently are not to be put into the Inventory.

i Sta. H. 3. an. 21. c. 5. 5 Mar. Dy. 152. 264.

The Lady C. was poſſeſſed of divers leaſes, and conveyed them in truſt, and afterwards married with A. B. the Lady received the money upon the leaſes, and with part of the mony bought jewels, and other part of the money ſhe left, and died; A. B. takes letters of adminiſtration of the goods of his wife: and in a ſuit in the Eccleſiaſticall Court, the Court would have compelled him to have given an account of the jewels, and for the moneys, to have put them into the Inventory. But the opinion of the whole Court of *B. R.* was, that he ſhould not put them into the Inventory; becauſe the property of the jewels was abſo-

absolutely in him as husband, and he had them not as Administrator; but of such things as be in action, and as he shall have as Administrator, he shall be accountable for, and they shall be put into the Inventory. And for the moneys received upon trust, it was resolved, that the same was the moneys of the trustees, and the wife had no remedy for it but in equity, and therefore the husband should have it as Administrator. And in that case it was resolved, that if a woman do convey a lease in trust for her use, and afterwards marrieth, that in such case it lieth not in the power of the husband to dispose of it; and if the wife die, the husband shall not have it, but the Executor of the wife †.

† T. 15 Car. B. R. St. *John. Saint Johns* cas.

§ VIII. Within what time the Inventory is to be made.

1. *The time for making and exhibiting the Inventory is left to the moderation of the Ordinary.*
2. *The Inventory ought to be made before the Executor meddle with the Testator's goods, except in some cases.*

THe (1) time appointed for the making and exhibiting of the Inventory, by the Laws Ecclesiasticall of this Realm is left to the discretion and moderation of the Ordinary [a]; who may appoint a shorter or longer time, as the distance of the place where the goods remain, being more or less, together with other circumstances, shall minister occasion [b].

And (2) if the Ordinary do not appoint a time, the Executor had need to beware, that he do not administer the goods of the deceased, untill he have caused an Inventory to be made: for howsoever the act of him that is named Executor is said to hold in Law before the proving of the Will [c], and the making of the Inventory [d]: nevertheless, he that so presumeth to meddle and administer as Executor, before he make an Inventory, is subject to Ecclesiasticall punishment *; unless it be for doing such things as cannot be deferred till the Inventory be made; as for intermeddling about the funerals, or disposing of such things as cannot be preserved with keeping, and such like [f].

[a] Text. in c. statut. § inventarium. tit. de testa. l. 3. provincial. constit. Cant. unde palam est non obtinere jus civile, quo hæres ad perficiendum inventarium quandoque 66 dies, quandoque annum habeat; maxime si incipiat intra mensem à morte defuncti. Sichar. in L. fin. § fin autem. C. de jure delib.

[b] Lind. in c. statut. verb. arbitrio.

[c] Plowd. in casu inter Greisb. & Fox. executor. testam. in text; & in gloss.

[d] Lind. in d. c. statut. verb. prius, in fin. illius gloss. * Legatin. libertat. de

[f] Jo. de Athon. in d. legatin. libertat. verb. inventarium. d. c. statut. § inhibemus.

§ IX.

§ IX. Of the form to be obſerved in the making of an Inventory.

1. *What perſons ought to be preſent at the making of the Inventory.*
2. *Whereof the Inventory is to be made.*
3. *Inventory to be indented.*
4. *Of the oath of the Executor about the Inventory.*
5. *The goods and chattels are to be valued.*
6. *Of the ancient form of preiſing the goods.*

BY the Statutes of this Realm [a], it is thus enacted concerning the form to be obſerved by the Executor teſtamentary in making of an Inventory; *viz.* "That the (1) Executor or Executors name the perſons, two at the leaſt, to whom the perſon dying was indebted or "made any Legacy, and upon their refuſall or abſence, two other honeſt perſons, and in their preſence, and by their diſcretions, ſhall "make, or cauſe to be made, a true and perfect Inventory (2) of all the "goods and chattels, wares and merchandiſes, as well movable as not "movable, whatſoever they were, of the ſaid perſon ſo deceaſed; and "the (3) ſame ſhall cauſe to be indented: whereof one part ſhall be "by his ſaid Executor (upon (4) his oath to be taken before the Biſhops, Ordinaries, their Officials and Ordinaries, or other perſon having power to take probate of the teſtament, upon the holy Evangeliſts) averred to be good and true; and the ſame one part indented, he ſhall preſent and deliver to the keeping of the ſaid Biſhop, "Ordinary, or Ordinaries, or other perſon whatſoever, having power "to take probate of teſtaments; and the other part of the ſaid Inventory "indented to remain with the Executor. And that no Biſhop, Ordinary, or Ordinaries, or other perſon whatſoever, having authority to "take probate of Teſtaments, upon pain in the ſaid Statute contained, "(*viz.* ten pound,) do refuſe to take any ſuch Inventory to him or "them preſented or tendered, to be delivered as is afore ſaid.

[a] Sta. H. 8. an. 21. c. 5.

Thus far the Statute. Whereunto it may be added, that (5) it is not ſufficient to make an Inventory containing all and ſingular the goods of the deceaſed, unleſs the ſame be particularly valued and preiſed [b] by ſome honeſt and skilfull perſons, to be the juſt value thereof in their judgments and conſciences, that is to ſay, at ſuch price as the ſame may be ſold for at that time [c].

In ancient (6) time, amongſt many other ſolemnities of Inventories [d], this order was obſerved: Firſt of all, the movable goods were inventoried and preiſed, as houſehold-ſtuff, corn, and cattel, &c. then the immovable, as leaſes of grounds or tenements; after that, the debts due to the Teſtator were ſet down *. Which order is for the moſt part obſerved at this time here in *England*, ſaving that ſome do omit leaſes, wherein they doe amiſs [f]; others preiſe them among the movables: but it were better to preiſe them ſeverally.

[b] Bar. in L. fin. C. de magiſt. conven. Hoc addito, quod quoad conſectionem inventarii executores magis aſſimilantur tutoribus quam hæredibus, ut ſuperius adnotavi ex Lind. in c. ſtatu. § inhibemus. de teſta. l. 3 Provincial. conſtitur. Cant. verb. prius. Laur. Va. tract. de Invent. fol. 101.

[c] De probatione rei mobilis vel immobilis, vid. Maſcard. tract. de probac. verb.

[d] De quibus DD. in L. fin. § ſin autem. C. de jure delib.

* Franciſc. Porcel. tract. de invent.

[f] Supr. ead. par. § 7.

§ X. Of

§ X. Of the effect and benefit of an Inventory.

1. *The goods contained in the Inventory are presumed to be in the hands of the Executor.*
2. *The Testator is presumed to have no more goods then are described in the Inventory.*
3. *Whether sufficiency of goods be presumed, when there is no Inventory.*

DIvers be the effects and benefits of an Inventory [a]: this one I thought good to note, namely, that (1) all such goods and chattels as are contained in the Inventory are presumed to have belonged to the Testator, and after his death to belong and to be in the power of the Executor [b]. And on the (2) contrary, that no more goods and chattels are presumed to have belonged to the Testator then are contained in the Inventory [c].

[a] Quorum Castrensis quinque, Minsingerus septem ostendit: ille in d. L. scimus, iste in § sed nostra. Instit. de hæred. qual. & differentia. Sed horum maxima pars nostratibus parum prodest.

[b] L. scimus. § legitima. C. de jure delib. & ibi Sichard.

[c] Bald. & Sichar. in d. § legitima.

And therefore if any Creditor or Legatary do affirm, that the Testator had any more goods then be compriſed in the Inventory, he must prove the same; otherwise the Judge is to give credit to the Inventory, being made in manner and form aforesaid [d]. Although indeed, when (3) the Executor entereth to the goods of the deceased, and maketh no Inventory thereof, nor will suffer the quantity thereof to be known; in that case our Law presumeth that the Testator had sufficient to discharge, not onely all his debts, but all his Legacies also *.

[d] Alciat. tract. de præsump. reg. 3. præs. 29. Mascard. de probac. concl. 939.

* Bald. in L. filium. C. famil. hercisc. n. 37. Sichard. in L. fin. § & si præfatam. C. de jure delib. n. 1.

§ XI. Of the probation and approbation of Testaments, and namely before whom they are to be proved.

1. *Divers questions about the probation of Testaments.*
2. *Testaments are to be proved before the Bishop or Ordinary.*
3. *Certain cases wherein Testaments are to be proved before others then before the Bishop.*
4. *Of the Prerogative of either Archbishop.*
5. *What is meant by* Notable goods.

COncerning (1) the probation and approbation of Testaments, these things are chiefly to be inquired: before whom the Testament is to be proved; by whom; when; how; and what fees be due in that behalf.

The

The perſon (2) before whom the Teſtament is to be proved, is the Biſhop of the Dioceſe where the Teſtator dwelleth [a], or his Officer [b]; to whom by the ancient cuſtome obſerved this many hundred years, together with the Royall conſent of the Kings and Princes of this land, the probation and approbation of Teſtaments hath appertained [c]: ſaving (3) in certain Seigniories or Lordſhips, where the probation and approbation of Teſtaments of the Tenants there dwelling doth by preſcription appertain to the principall Lord [d]: and ſaving in certain peculiar juriſdictions, where by preſcription or compoſition, or other ſpecial title, the probation and approbation of the Teſtaments of ſuch as dwell and die within thoſe places doth appertain to the Judge of the peculiar *: and ſaving where no goods are bequeathed in the Teſtament, but onely lands, tenements and hereditaments, or other lay fees, are deviſed; and that in ſuch places where neither inſinuation nor inrotulation is neceſſary [f]: and ſaving (4) where the party deceaſed at the time of his death had *Notable goods* extant in divers Dioceſes or Juriſdictions. For the probation, approbation, and inſinuation or publication, of the laſt Wills and Teſtaments of ſuch perſons doth appertain to the Archbiſhop or Metropolitan, within whoſe Province ſuch *Notable goods* be diſperſed in divers Dioceſes, or other inferiour juriſdictions [g], whether it be within the Province of *Canterbury* [h], or within the Province of *York* [i].

[a] Legatin. libertat. de exec. teſtam. c. item quia. c. ſtatut. de teſta. l. 3. provincial. conſt. Cant. c. ſtatuimus. lib. provincial. conſtit. Ebor. & Lind. in d. c. ſtat. Doct. & Stud. l. 2. c. 28. Perkins tit. teſtament, fo. 94. Tract. de repub. Angl. lib. 3. cap. 7. Stat. Hen. 8. an. 21. cap. 5.

[b] Perkins ubi ſupra. Fitz. Abridg. tit. teſtament. n. 3. Brook eod. tit. n. 12. c. fin. de fide inſtr. extr. Sich. in l. 2. n. 3. C. de teſt.

[c] Lindw. in d. c. ſtat. verb. eccleſiaſticarum libertatum. qui in d. c. item quia, verb. inſinuationem, ſeu publicationem, ait jure Civili non pertinere ad Epiſcopos, ſed jure tantum Authenticorum, (quo jus codicis corrigitur, & quod jus authenticum ſancitum fuit ab imperatore Juſtiniano ultra mille annos retro numerandos.) Non ſolum executio, ſed etiam ipſa inſinuatio & publicatio, coram Epiſcopis ordinariam juriſdictionem exercentibus fieri poteſt, ut firmat Sichardus in L. 2. C. de teſta. 3.

[d] Fitz. tit. Teſtament, n. 2. Doct. & Stud. lib. 2. cap. 28.

* Jo. de Athon. in legatin. libertat. de execut. teſta. verb. Ordinario.

[f] Supra part. 3. § 3.

[g] Lind. in d. c. ſtatut. verb. ad quos pertinet. Perk. tit. teſtament, fol. 94. Fitz. Abridg. tit. adminiſt. n. 7. Brook eod. tit. n. 48.

[h] Lindw. in d. c. ſtatutum. verb. Laicalis feodi. Stat. H. 8. an. 23. c. 9. & plenius per Inſtrum. & Actorum libros curiæ prærogativæ Archiepiſc. Cant.

[i] Perkins tit. teſtament, fol. 94. pag. 2. Stat. H. 8. an. 23. c. 9. & evidentius per Inſtrum. & Actorum libros in archivis Archiep. Ebor. fideliter per plurimorum ſeculorum curricula conſervata.

The probate of Teſtaments did belong to Ordinaries but of late times, *de conſuetudine Angliæ, & non de jure communi*; and the power to grant adminiſtration was granted to the Ordinary by the Stat. of 31 E. 3. c. 11. And in ancient time, when a man died inteſtate, and had made no diſpoſition of his goods, the truſt of them was committed to the King, who is *Parens patriæ*, to the intent they might be diſpoſed for the burial of the dead, the payment of the inteſtate's debts, and the advancement of his wife and children; and the Ordinary was conſtituted by the King *in loco parentis*, and his power given him by the Statute. (a)

(a) Coke lib. 9. fol. 37, 38. *Henſhes* caſe.

But the Ordinary hath no property in the inteſtate's goods, to diſpoſe of them to his own uſe, or to the uſe of any other. (b)

(b) Coke lib. 9. fo. 38.

The Commiſſary of the Biſhop of the Dioceſe granted letters *ad colligendum & ad vendendum ea quæ peritura eſſent, & inde compotum reddere*; the grantee ſold goods which would not keep, but periſhed; and an action of debt was brought againſt him as Executor of his own wrong:

wrong: and it was adjudged maintainable, becauſe the Ordinary himſelf had no ſuch power, and therefore could not give it to another. (c)

(c) 7 Eliz. Dy. 256.

If leſſee for years of lands by his laſt will deviſe his term to A. whom he maketh his Executor, and dieth; A. entered before any probate of the will, and held the ſame for a year, and died: *per Curiam*, the property of the term was lawfully veſted in the Executor by his entry, and the deviſe well executed without any probate. (d)

(d) M. 22 Eliz. Dyer 367.

The probate of every Biſhop's Teſtament, or the granting adminiſtration of his goods, although he had no goods but within his own juriſdiction, doth belong to the Archbiſhop of the ſame Province. (e)

(e) Coke 4. Inſtit. ch. 74.

If a Teſtament be diſproved in the Eccleſiaſtical Court, and the party appeals to the Metropolitan, and it is there diſproved, and afterwards there is an appeal to the Court of Delegates, and it is there diſproved alſo, and at laſt the party appeals to the Queen in Chancery, by the Stat. 25 H. 8. and there alſo it is diſproved before the Commiſſioners: if the Queen *ex regali authoritate* might grant letters of Adminiſtration, was the queſtion. The opinion of the Juſtices of the Common Pleas was, that ſhe might, becauſe the ſaid Court of Chancery is the higheſt Court, and the matter being once there, it cannot be determined in any inferiour Court: and then the party may ſhew in his declaration generally the matter; and that Adminiſtration was granted to him by the Queen *ex ſua regali authoritate* under the ſeal of the Court of Delegates. (f)

(f) M. 24 Eliz. C. B. 10 Jac. B. R. *Stephenſons* caſe. Contra, that the Court of Delegates cannot grant letters of Adminiſtration.

And leſt Executors ſhould be cited to appear in divers Courts for the probate of any Will; in this caſe, by the late Conſtitutions and Canons Eccleſiaſticall of the Biſhops and Clergy of this Realm, confirmed by the King's moſt excellent Majeſty, and commanded to be obſerved in both the Provinces of *Canterbury* and *York*, it is ordained as followeth, *viz.* † "Foraſmuch as many heretofore have been by Apparitors, both of "inferiour Courts and of the Courts of Archbiſhops prerogatives, "much diſtracted, and diverſly called and ſummoned, for probate of "Wills, or to take Adminiſtration of the goods of perſons dying inteſtate, and are thereby vexed and grieved with many cauſeleſs and unneceſſary troubles, moleſtations and expences; We conſtitute "and appoint that all Chancellours, Commiſſaries, or Officials, or "any other exerciſing Eccleſiaſticall Juriſdiction whatſoever, ſhall at "the firſt, charge with an oath all perſons called, or voluntarily appearing before them, for the probate of any Wills, or the adminiſtration "of any goods, whether they know, or (moved by any ſpeciall inducement) do firmly believe, that the party deceaſed (whoſe Teſtament or goods now depend in queſtion) had at any time of his or "her death any goods, or good debts, in any any other Dioceſe, or "Dioceſes, or peculiar Juriſdiction within that Province, then in that "wherein the ſaid party died, amounting unto the value of five pounds. "And if the ſaid perſon, cited, or voluntarily appearing before him, "ſhall upon his oath affirm, that he knoweth, or (as is afore ſaid) "firmly

† Lib. Canon. Eccleſ. edit. ann. Dom. 1603. c. 92.

"firmly believeth, that the ſaid party deceaſed had goods, or good "debts, in any other Dioceſe, Dioceſes, or peculiar Juriſdiction with- "in the ſaid Province, unto the value aforeſaid, and particularly ſpe- "cify and declare the ſame; then ſhall he preſently diſmiſs him, not "preſuming to intermeddle with the probate of the ſaid Will, or to "grant Adminiſtration of the goods of the party ſo dying inteſtate: "neither ſhall he require or exact any other charges of the ſaid parties, "more then ſuch onely as are due for the Citation and other Proceſs "had and uſed againſt the ſaid parties upon their farther contumacy; "but ſhall openly and plainly declare and profeſs, that the ſaid cauſe "belongeth to the Prerogative of the Archbiſhop of that Province, "willing and admoniſhing the party to prove the ſaid Will, or require "Adminiſtration of the ſaid goods, in the Court of the ſaid Prerogative, "and to exhibit before him the ſaid Judge the Probate or Adminiſtra- "tion under the ſeal of the Prerogative, within forty daies next follow- "ing. And if any Chancellour, Commiſſary, Officiall, or other ex- "erciſing Eccleſiaſticall juriſdiction whatſoever, or any their Regiſter, "ſhall offend therein, let him be *ipſo facto* ſuſpended from the executi- "on of his office, not to be abſolved or releaſed, untill he have reſtored "to the party all expences by him laid out contrary to the tenour of the "premiſſes: and every ſuch probate of any Teſtament, or Adminiſtra- "tion of goods ſo granted, ſhall be held void and fruſtrate to all effects "of the law whatſoever.

"Furthermore, we charge and enjoyn, that the Regiſter of every "inferiour Judge do, without all difficulty or delay, certify and inform "the Apparitor of the Prerogative Court, repairing unto him, once a "month, and no oftner, what Executors or Adminiſtrators have been "by his ſaid Judge, for the incompetency of his own juriſdiction, diſ- "miſſed to the ſaid Prerogative Court, within a month next before, "under pain of a month's ſuſpenſion from the exerciſe of his Office for "every default therein. Provided that this Canon, or any thing there- "in contained, be not prejudiciall to any compoſition between the "Archbiſhop and any Biſhop or other Ordinary, nor to any inferiour "Judge, that ſhall grant any probate of Teſtament, or Adminiſtration "of goods, to any party that ſhall voluntarily deſire it, both out of the "ſaid inferiour Court, and alſo out of the Prerogative. Provided like- "wiſe, that if any man die *in itinere*, the goods that he hath about him "at that preſent ſhall not cauſe his Teſtament or Adminiſtration to be "liable to the Prerogative Court. And concerning the rate of *Bona no- tabilia*, liable to the Prerogative Court, it is ordained in the very next * Canon as followeth: *viz.* * D. lib. Can. 93.

"Furthermore, we decree and ordain, that no Judge of the Arch- "biſhop's Prerogative ſhall henceforward cite, or cauſe to be cited *ex* "*officio*, any perſon whatſoever, to any of the aforeſaid intents, unleſs "he have knowledge, that the party deceaſed was at the time of his "death poſſeſſed of goods and chattels in ſome other Dioceſe, Dioceſes, "or peculiar Juriſdiction within that Province, then in that wherein "he died, amounting to the value of five pounds at the leaſt; decreeing

"and declaring, that whoſo hath not goods in divers Dioceſes to the "ſaid ſum or value, ſhall not be accounted to have *Bona notabilia.* Al- "waies provided, that this clauſe here, and in the former Conſtitutions "mentioned, ſhall not prejudice thoſe Dioceſes, where, by compoſition "or cuſtome, *Bona notabilia* are rated at a greater ſumme. And if any "Judge of the Prerogative Court, or any his Surrogate, or his Regi- "ſter, or Apparitor, ſhall cite, or cauſe any perſon to be cited into his "Court, contrary to the tenour of the premiſſes, he ſhall reſtore to the "party ſo cited all his coſts and charges, and the acts and proceedings "in that behalf ſhall be held void and fruſtrate; which expences if "the ſaid Judge, or Regiſter, or Apparitor, ſhall refuſe accordingly to "pay, he ſhall be ſuſpended from the exerciſe of his office, untill he "yield unto the performance thereof.

What (5) is meant by *Notable goods* in this place, or when they are ſo to be termed, divers Authours have been of divers opinions. Some have been of this opinion, that if the Teſtator died poſſeſſed of goods or chattels to the value of forty ſhillings in two ſeveral Dioceſes, then he ought to be deemed to have *Notable goods* [k]. Others have been of that mind, that the Teſtator is to be deemed to have *Notable goods*, though at the time of his death he had but one in another Dioceſe [l]. Others do not onely vary from the former opinions, but are alſo at variance with themſelves, accounting thoſe for *Notable goods*, ſometimes, when they extend clearly to an hundred ſhillings ſterling; ſometimes, when they extend to ten pound, eleven ſhillings ſix pence; ſometimes, when they extend to twenty three pound, three ſhillings, farthing, and not under [m]. Finally, others are of this judgement, that he is ſaid to have *Notable goods*, which hath goods to the value of ten pound of currant money of *England* diſperſed in divers Dioceſes or Juriſdictions. *And this opinion ſeemeth to me to be moſt commonly received* [n].

(But the Law at this day is, that five pounds is the ſum or value of *Bona notabilia.* But where by compoſition or cuſtome in any County *Bona notabilia* are rated at a greater ſum, the ſame is to continue unaltered: as in the Dioceſe of *London* it is ten pounds by compoſition [o]. And if any man die *in itinere* or in a journey, the goods that he hath then about him or with him ſhall not be as *Bona notabilia*, to cauſe Adminiſtration to be committed, or the Will to be proved in the Prerogative [p].)

For the better underſtanding whereof, three things are to be noted. Firſt, that it is not neceſſary, that the party deceaſed ſhould have ten pound in every of thoſe ſeverall Dioceſes or Juriſdictions where his goods be diſperſed; But that it is ſufficient, if the party deceaſed were poſſeſſed of goods and chattels in ſome other Dioceſe, Dioceſes, or Juriſdictions peculiar within that Province wherein he died, of the value of five pound, beſides thoſe goods extant where he died. Secondly, albeit the deceaſed's goods or chattels, whereof he died poſſeſſed, did amount to ten pound or more; yet if the goods and chattels extant in ſome other Dioceſe, Dioceſes, or Juriſdiction peculiar, did not extend to five pound at the leaſt, in this caſe the deceaſed is not to be accounted

to

[k] Perkins tit. teſtament, fol. 34.

[l] Fitz. tit. Adminiſt. n. 7.

[m] Lindw. in d. c. ſtatutum. verb. laicis.

[n] Plowd. in caſe inter Greisb. & Fox, fol. 281.

[o] Coke 4. Inſt. ch. 75. fol. 335.

[p] *Office of Exec.* c. 4. § 2.

to have *Bona notabilia*. Thirdly, that good debts amounting to 5 pounds, due by one or moe, dwelling in some other Diocese, Dioceses, or Jurisdiction peculiar, without that Diocese, yet within that Province wherein the party died, to whom the same was due, do make *Bona notabilia*, (to the effect aforesaid) as well as goods or chattels, personall or reall. Which three Conclusions are easily collected out of those two formerly recited Canons, whereby all old controversies about the rate of *Bona notabilia* are now decided.

If the penall sum of a bond be but five pound for the payment of a less sum, although the bond be forfeited, yet that is not understood as *Bona notabilia*, although in Law the whole penall sum be a duty [a]. And those debts are said to be *Bona notabilia*, where the Bonds or other Specialties are, and not where the Debtors inhabit: so that if the Bonds be in the County where the Testator died, and the Debtors in another County, in this case the Will is not to be proved in the Prerogative Court. But in case the debts are onely by contract without Specialty, they are then to be esteemed *Bona notabilia* there and in that place where the Debtor is. But in case Lands be by Will given to be sold for payment of debts and legacies, this is not to be accounted as *Bona notabilia*, though it be Assets: for where Land is bequeathed to be sold for such uses, there neither the money raised thereby, nor the profits thereof, shall be accounted as any of the Testator's goods [b].

[a] *Office of Executor*, c. 4. § 2.

[b] Ibidem.

An Action of debt is brought by an Administratrix upon an Administration granted by the Bishop of *R.* the Defendant pleaded an Administration committed to him by the Dean and Chapter of *Canterbury sede vacante*, because the intestate had *Bona notabilia*; the Plaintiff replied, that the said Administration was repealed: and it was adjudged for the Plaintiff. 1. Because the Defendant did not shew what *Bona notabilia* the intestate had in certain; and it shall be intended that he had not *Bona notabilia*, and such Administration is but voidable. 2. Because before the repeal of the Administration committed by the Metropolitan, the inferiour Ordinary may commit Administration; and when the Defendant's Administration is repealed, it is void *ab initio*. And in the principall case it was also resolved, that whereas the Administration was committed to the Obligor, that the debt was not extinct, because it is in another's right: otherwise it is if the Obligee himself made the Obligor his Executor [c].

[c] 8 Jac. lib. 8. fol. 135. Sir *Jo. Needhams* case.

Debt as Administrator upon an Obligation: The Case was; that the intestate died in *L.* but the obligation was in *London*; at the time of his death the Bishop of *Chester*, in whose Diocese the intestate died, committed Administration to J.S. who released to the Defendant; and the Archbishop of *Canterbury* committed the Administration to the Plaintiff. This release was pleaded in bar: and it was thereupon demurred. *Warburton*; Every debt follows the person of the debtee, and *Chester* is within the Province of *York*, wherein the Archbishop of *Canterbury* hath nothing to doe. *Anderson*; When one dies who hath goods in divers Dioceses in both Provinces, there *Canterbury* shall have the prerogative; otherwise there would be two Administrations committed,

mitted, which is *res inaudita:* the Debt is where the Bond is, being upon a Specialty; but Debt upon a contract follows the person of the Debtor: and this difference hath been often agreed. Dyer 305. And if the Archbishop of *Canterbury* hath not any prerogative in *York*, but that severall Administrations ought to be granted; yet at leastwise Administration for this Bond ought to be committed by the Archbishop of *Canterbury:* wherefore this release is not any bar[d].

[d] H. 38 Eliz. B. R. *Byron* versus *Byron.* Crook part 3. fo. 472.

If a man hath goods in divers Dioceses or Provinces, and makes his Executor of his goods in one of the Provinces, and dies intestate as to his other goods; if the Ordinary do commit Administration of the goods which are in the other Province unto the said Executor, then is he both Executor and Administrator, and the party died both testate and intestate*.

* 35 H. 6. fol. 36.

In Trespass the Case was, A lessee for years, by severall leases, of divers lands, some of them in the Diocese of *York*, some in another peculiar within the same Diocese, devised all these leases to his Son, and made his Daughter within age his Executrix; the Mother takes Administration *durante minori ætate* of the Executrix (in F. the peculiar where the Testator died) *ad commodum Executricis*; the Administratrix *durante minori ætate* granted this term to the Plaintiff: It was adjudged this was no good grant; because he hath but a speciall property *ad commodum Executricis*, and no general property, as other Executors or Administrators. 2. It was moved, whether Administration should in this case be granted in two places; *viz.* the one within the peculiar, the other by the Bishop of *York*, Ordinary of the Diocese: or whether he should have the prerogative of both; as he had where *Bona notabilia* are in divers Dioceses. It was resolved, that there should be two Letters of Administration granted: for the Archbishop shall not have any prerogative here, because this peculiar was first derived out of his Jurisdiction[f].

[f] H. 41 Eliz. rot. 1097. *Price* versus *Simpson.* Crook part 3. fol. 719.

Administration is granted in the Diocese of *Canterbury*, and the Administrator recovers in debt brought by him, and hath Judgement, and hath a *Scire fac.* upon it after the year; the Defendant pleaded, that the intestate died in *London*, and had not *Bona notabilia* in divers Dioceses; and that Administration in *London* was committed to the wife. *Per Curiam* the Defendant came too late to plead this plea; for that it is an annulling of the record, which is not sufferable. But if the Administration had been repealed, he might well have avoided the Judgement by this plea[g].

[g] H. 34 Eliz. rot. 720. *Allen* vers. *Andrewes.* Crook part 3. fol. 283.

Luker Merchant of *Ireland* was obliged in 80 li. to one D. of *London*; the Obligation was made in *Ireland*, but alwaies remained in *London*; D. dies intestate in the County of *Bedford* in *England*; the Bishop in *Ireland* commits Administration to the son of D. and he releases; the Archbishop of *Canterbury* commits Administration in *England* to the wife of D. which had the said Obligation, and recovered: for the Administration shall be committed by the Ordinary of the place where the Obligation is at the death of the intestate, and not where the debt commenceth, for it is not locall[h].

[h] 14 Eliz. *Lukers* case. Dy. fo. 305.

To

To make *Bona notabilia*, a debt without a Specialty ſhall be accounted goods where the Debtor lives, and not where the Teſtator lived. Likewiſe if a man dies inteſtate, having divers Debts or Obligations in ſeverall Dioceſes, the debts are ſaid to be *Bona notabilia* where the Bonds or Obligations are, not where the Debtor or Debtees are [i].

If a man dies inteſtate having goods in divers Dioceſes, the Metropolitan ſhall grant the Adminiſtration. 14 H. 6. 21. 10 H. 7. 18. 35 H. 6. 43. If he hath *Bona notabilia* to the value of one hundred ſhillings in divers Dioceſes, the Metropolitan ſhall grant the Adminiſtration. 10 H. 7. fol. 16. Or if a man dies beyond the Seas inteſtate, the Archbiſhop ſhall grant the Adminiſtration [k].

If a man hath goods to the value of 5 li. in one Dioceſe, and a leaſe for years of the ſame value in another Dioceſe; they are *Bona notabilia*, whereby the Archbiſhop ſhall grant the Adminiſtration, although the leaſe for years be not a thing movable, nor properly *bonum*, but it is a chattell [l].

If a man becomes bound in an Obligation at *London*, and dies inteſtate in *Devon*, and there hath the Obligation at the time of his death with him; the Adminiſtration ought to be granted by the Biſhop of *Exon*, where the Obligation was at the time of his death, and not by the Biſhop of *London*, where the Obligation was made: for the debt ſhall be accounted goods, as to the granting of letters of Adminiſtration, where the Bond was at his death, and not where it was made [m].

In debt brought by an Adminiſtratrix upon an Adminiſtration committed by the Biſhop of *R.* the Defendant pleaded an Adminiſtration committed to him by the Dean and Chapter of *C. ſede vacante*, becauſe the inteſtate had *Bona notabilia* in divers Dioceſes; the Plaintiff replied, that before the writ brought, the ſaid Adminiſtration granted in the Prerogative Court was revoked and annulled. It was adjudged, that, becauſe the Defendant had not ſhewed in his bar, that the inteſtate had *Bona notabilia* in certain, it ſhall be intended that the Adminiſtration was granted where the inteſtate had not *Bona notabilia* in divers Dioceſes [n].

Furthermore, this is not to be omitted, that if a man die, and have goods in one inferiour Dioceſe or Juriſdiction onely, and yet the Metropolitan within whoſe Province that Dioceſe or Juriſdiction peculiar is ſituated, pretending that he hath *Bona notabilia* in divers Dioceſes or Juriſdictions within his Province, doth commit the Adminiſtration of his goods; this Adminiſtration is not void, but voidable by ſentence, for that the Metropolitan hath Juriſdiction over all the Dioceſes within his Province, and for that cauſe it cannot be void, but onely voidable by ſentence. But if any Ordinary of a Dioceſe, or Commiſſary of a peculiar Juriſdiction, commit the Adminiſtration of his goods that hath *Bona notabilia* in divers Dioceſes; in this caſe the Adminiſtration is meerly void, as well concerning the goods within his own Dioceſe, as the other goods without his Dioceſe, becauſe by no means he can have Juriſdiction of that cauſe which belongeth to his Superiour †.

[i] T. 17 Jac. *Trowbridge* verſ. *Taylor*. Rolles Abridg. tit. execut.

[k] Rolles Abridg. ibid. 14 H. 6. 21. 10 H. 7. 18. 35 H. 6. 43. 10 H. 7. 16. b.

[l] Rolles Abrid. ibid.

[m] T. 14 Car. inter *Lunn* & *Dodſon*. Rolles Abridg. ibidem.

[n] C. lib. 8. fol. 135, 136. Sir *Jo. Needhams* caſe.

† D. Coke lib. 5. relation. *Princes* caſe, fo. 30. 22 Eliz. *Vere* and *Jefferies* caſe.

§ XII. By

§ XII. By whom the Teſtament is to be proved.

1. *The Teſtament is to be proved by the Executor.*
2. *Any perſon having the Teſtament may be compelled to exhibit the ſame.*

THE (1) perſon by whom the Teſtament is to be proved, is the Executor named in the Teſtament [a]; whom the Ordinary, or other perſon having authority for the probate of the Teſtament, may convent, to the intent to prove the Teſtament, and to take upon him the Execution thereof, or elſe to refuſe the ſame [b].

[a] Perkins tit. teſtament, fol. 93.

[b] Stat. H. 8. an. 21. c. 5.

If on proceſs or ſummons from the Judge the Executors appear not to prove the Will, they are puniſhable for contempt: if they appear, but refuſe to prove the Will, the Judge may grant Adminiſtration to the Widow or next of kin. (*a*) Refuſal cannot be by word onely, but it muſt be entred and recorded in Court, and therefore done before a competent Judge. When an Executor hath once adminiſtred, he cannot afterwards refuſe to prove the Will, and take on him the Executorſhip: and in that caſe the Ordinary ought not to accept of ſuch a refuſal, but to compell him to prove the Will, and take upon him the Executorſhip. (*b*) Yet if the Judge doth admit one to refuſe, notwithſtanding his having formerly refuſed, it ſhall ſtand good. (*c*)

(*a*) 9 E. 4. 33. Pl. Com. fol. 184. a. C. lib. 9. fol. 37, 38, *Henſloes* caſe.

(*b*) 9 E. 4. 47. Pl. Com. fol. 280. b. *Greisbrookes* caſe.

(*c*) 26 H. 6. fol. 78.

But after refuſal, and Adminiſtration committed to another, the Executor cannot recede from it, and go back to prove the Will, and aſſume the Executorſhip. Yet if after refuſal it ſhall appear to the Judge, that the Executor had adminiſtred before ſuch refuſal, he may revoke the Adminiſtration, and compell the Executor to prove the Will.

In debt brought againſt an Executor, it is a good plea, that the Teſtator made him and another Executor, who is alive, not named, without ſaying the Teſtament is proved. (*d*)

(*d*) Lib. 9. fo. 37, 38. *Henſloes* caſe.

This may the Ordinary or other competent Judge doe, not onely *ex officio* [c], but at the inſtance of any party having intereſt [d]; which intereſt is proved by the oath of the party *.

[c] L. 1. ff. quemadmodum teſta. app. & ibi Bar. n. 1. [d] Bald. & Angel. in d. L. 1. Opinor etiam quod ad ejus inſtantiam cui nihil eſt relictum, exhibendum teſta. ſcilicet, ut inde certior fiat, numquid legatum aliquod ſibi relictum ſit à defuncto. gloſſ. & Bald. in L. 2. ff. quemadmodum teſta. app. in princ. * Bar. & Bald. in d. L. 1.

If the Executor have not the Teſtament in his cuſtody, but (2) ſome other perſon, then may ſuch perſon be compelled to exhibit the ſame [f]. And it is ſufficient to prove that once he had it; for he is preſumed ſtill to have the ſame, unleſs he affirm upon his oath, that the ſame is not in his poſſeſſion [g].

[f] L. 1. in prin. & § hoc interd. ff. de Tab. exhibend.

[g] Alex. in L. 2. C. de teſta. n. 3. verb. tamen.

§ XIII.

§ XIII. When the Teſtament is to be exhibited and proved.

1. *The Teſtament is not to be proved whilſt the Teſtator liveth, but after his death.*
2. *If it be unknown whether the Teſtator be dead or alive, whether may his Teſtament be proved?*

IF (1) the Teſtator be yet living, the Judge may not proceed to the proving and publiſhing of his Teſtament [a], at the petition either of the Executor, or any other, ſaving at the requeſt of the Teſtator himſelf [b]. For at his petition the Teſtament may be recorded and regiſtred amongſt other Wills: but it is not to be delivered forth under the ſeal of the Ordinary with a probate, becauſe it is of no force ſo long as the Teſtator liveth; who alſo may revoke or alter the ſame at any time before his death, as hereafter is declared *.

But if the Teſtator be dead, the Judge may proceed to the proving of the Will [c]: and the time of exhibiting and proving the ſame is left to his diſcretion, and he may appoint a longer or a ſhorter time, according as the place is farther diſtant or nearer, or as other due circumſtances ſhall induce him [d].

If (2) it be unknown whether the Teſtator be living or dead; foraſmuch as ſome are of opinion, that every man is preſumed to live till he be an hundred years old *; it ſeemeth by this opinion, that the Judge may not in the mean time proceed to the publication of the Teſtament, unleſs there be lawfull proof, or ſufficient preſumption, for the Teſtaſtor's death [f]. On the contrary, others are of opinion, that a man is not preſumed to live ſo long, that is to ſay, untill he attain to an hundred years [g], for that men commonly die betwixt ſixty and ſeventy years of their age [h]: and ſo by their opinion it ſeemeth that the Will may be proved after the age of ſeventy years of him that is abſent, for that he is not then preſumed to be living.

[a] L. 2. § ſi dubitetur, in fin. ff. quemadmodum teſta. app.

[b] Bar. in d. § ſi dubitetur. Sichard. in L. 2. C. de teſta.

* Vide infr. eod. lib. part. 7. § 14. & § 15.

[c] L. 2. C. de teſtam & DD. ibidem.

[d] L. 2. § utrum. ff. quemadmodum teſta. app.

* Quam opinionem (tanquam communem) acriter defendit Vivius, Theſaur. com. op. verb. vivere. Molinæum hæreticum appellans, qui contrariam crebriorem dixit.

[f] Pract. Papienſ. in form. libel. 1. pet. hæred. ex teſt.

[g] Quorum opinionem magis communem refert Molinæus in Apoſt. ad Alex. conſil. 1. vol. 5. n. 24. Menoch. de præſum. lib. 6. fol. 545. q. 49. [h] Franc. Herculan. de probac. negativ. n. 290. pro quo facit Pſalmus 90.

I ſuppoſe if a man be abſent, and no certain proof of his death or life, that the Will may be proved, and that the Teſtament it ſelf is a preſumption of his death in this caſe [i].

[i] Jaſ. & Sichard. in d. L. 2. C. de teſta. alter n. 7. alter n. 8. Temperanda eſt hæc concluſio, ut per Menoch. Tract. de adipiſcend. poſſ. remed. 4. n. 669. fol. (mihi) 218.

It is a great queſtion, whether the death of one that is abſent may be proved by a common voice and fame †, that is to ſay, by the conſtant report and opinion of the more part of the diſcreet and honeſt inhabitants of the pariſh, town, or place of his former dwelling that is

† Maſcard. Tract. de probat. concluſ. 1074.

‖ Tho. de Piperat. & Marquard. Tract. de fama, princ. Dec. Tholoſ. q. 379.

now abſent ‖: wherein ſome hold the affirmative, others the negative; a third ſort diſtinguiſhing whether the matter in queſtion be of ſmall or great moment: if ſmall, then the fame is a ſufficient proof; if great, then inſufficient. (a) Which diſtinction without queſtion is very reaſonable. Whereupon we are to conſider, whether the proving of the Will of him that is abſent be a matter of great or ſmall moment. Wherein, for my own part, I hold it to be a matter of great importance, becauſe it concerneth a man's whole eſtate. (b) And yet nevertheleſs, I hold it to be a more ſafe courſe to prove the Will, at leaſt when the Executor is an honeſt ſubſtantial man, then to ſuffer the goods to periſh, or to be ſubject to be purloyned by men and means unknown. But to return to the queſtion formerly propounded, whether the death of him that is abſent may be proved by a common voice and fame; it may be determined by theſe caſes following. Whereof the 1. is, when the party hath been abſent long, and the fame of his death ancient; this fame alone is a ſufficient proof of his death. (c) The 2. caſe is, when the fame is that he died in a place far diſtant, (as peradventure beyond the ſeas;) in which caſe the fame of his death is ſufficient: but if he died in a place not far off, then it may be known by witneſſes whether he be dead or alive: in which caſe the fame alone is not a ſufficient proof. (d) The 3. is, when the fame did firſt ſpring from grave and credible perſons; for then it ſufficeth, otherwiſe not. (e) The 4. caſe is, when the fame is naked or deſtitute of other probabilities; for then it is not enough: but being ſtrengthened with other conjectures, as that the party abſent was a very old man, or very ſickly; then the fame, thus fortified with preſumptions of nature, doth make a full proof of his death. (f) The 5. caſe is, when the fame is aſſiſted with other likelihoods derived from ſuch accidents as we do attribute unto Fortune; as when the party taketh ſhip to travell beyond the ſeas, and being upon the main, a tempeſt doth ariſe, and the expected time of his return being paſt, he returneth not, neither can the ſhip after diligent inquiry be heard of: for in this caſe, the fame, accompanied with theſe circumſtances, doth ſufficiently prove his death. (g) And ſo it is when a man is preſſed to the wars, which being ended, and the reſt of the army returned, yet he doth not return with them, nor can it be known by enquiry what is become of him: for then the fame, being thus furniſhed, is a ſufficient proof of his death, (h) untill the contrary doth appear, as ſometime it doth. For it is moſt true that one in *Yorkſhire* took ſhipping (amongſt other) for *Portugall* voiage; and after ſome exploits, his fellow-ſouldiers returning, he came not, nor could be heard of; and thereupon a fame did ariſe that he was dead, whereupon adminiſtration of his goods was committed: and whilſt his kinſfolk were in ſuit about the ſame, after ſome three years abſence, he, not expected, returned, and took up the controverſie. Wherefore it ſhall behove the Ordinary in theſe and the like caſes, at the proving of the Will or the granting of Adminiſtration, to take bond of the Executor or Adminiſtrator, with good ſurety, to make full reſtitution or ſufficient recompence to the abſent, in caſe of his life or return.

(a) Deciſ. Tholoſ. q. 312. cum addic. Aufre.

(b) Panor. in cap. querela. de procur. ex. n. 9. & DD. ibidem.

(c) Maſcard. de probat. concl. 1074. n. 4. Bald. conſil. 398. Menoch. de adipiſcend. poſſ. remed. 4. n. 672. Gravett. conſ. 127. in fin.

(d) Maſcard. de prob. concl. 1074. n. 5. poſt Alex. Bar. Ang. Spec. & alios ibi citatos.

(e) Maſcard. ubi ſupra, n. 6.

(f) Bar. in tract. de Teſtib. n. 38. Menoc. & Maſcard. ubi ſupra.

(g) Maſcard. poſt alios ubi ſupr. n. 7.

(h) Bar. tract. de teſtibus, n. 38. & poſt eum Alex. Aufre. & alii quos memorat Maſcard. ubi ſupra, n. 8.

Other

Other means and other preſumptions there be to prove the death of him that is abſent*: which nevertheleſs are left to the wiſedom and diſcretion of the judicious Ordinary, to whom alſo I refer the ſame.

* Ibidem.

Regularly Teſtaments ought to be inſinuated to the Official or Commiſſary of the Biſhop of the Dioceſe within 4 months next after the Teſtator's death. (*a*) The Ordinary may ſequeſter the goods of the deceaſed, untill the Executors have proved the Teſtament: ſo may the Metropolitan, if the goods be in divers Dioceſes. (*b*) Alſo the Ordinary may compell the Executor to prove the Will, and to accept or refuſe the Adminiſtration. If the Executor refuſe, or if there be a Will made, and no Executor appointed, the Ordinary muſt commit Adminiſtration, *cum teſtamento annexo*, to whom he ſhall think fit, and take bond of the Adminiſtrator to perform the Will. If no Will be made, he muſt grant Adminiſtration to the next of kin: if they refuſe it, then to whom ſhall deſire it. And if no body take the Adminiſtration, the Ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceaſed into his own hands, wherewith he is to pay the debts and legacies ſo far as the goods will reach: (*c*) for which himſelf becomes liable in law, as other Executors or Adminiſtrators.

(*a*) Fulb. par. part. 3. Dial. 3. fo. 32.

(*b*) 9 E. 4. fo. 33.

(*c*) 31 E. 3. c. 11. 13 E. 1. c. 19. 21 H. 8. c. 5.

§ XIV. Of the manner of proving Teſtaments.

1. *The form of proving Teſtaments is twofold.*
2. *Of the vulgar form.*
3. *Of the form of law.*
4. *Of the difference betwixt the vulgar and the legall form.*
5. *Of a third form of probation of Teſtaments.*
6. *Of the oath and bond of the Executor.*

THat it is neceſſary for the proof of Teſtaments that there be either witneſs or writing, is already declared [a]; alſo what number of witneſſes, and what manner of writing, is ſufficient, is likewiſe declared [b]: wherefore in this place I ſhall not need to ſpeak, ſaving onely of the manner of proceeding in the probation and approbation of Teſtaments.

[a] Supra part. 4. § 1.

[b] Supra d. part. 4. § 25, 26.

This (1) manner and form therefore here in *England* is of two ſorts; the one is called the *vulgar* or *common form*, the other is termed the *ſolemn form*, or *form of Law* [c].

[c] Ad imitationem confirmationis, quæ nunc fit in forma communi, nunc in forma ſolenni & ſpecifica. Molin. in conſuet. Pariſ. § 5. Alex. conſil. 123. vol. 4. n. 18. &c. Dec. in Rub. de confir. utili vel inutili.

The (2) *vulgar* or *common form* is more compendious or brief then the other: for after the death of the Teſtator, the Executor preſenteth the Teſtament to the Judge, and in the abſence, and without citing

or calling of such as have interest, produceth witnesses to prove the same, who testifying upon their oaths (*viva voce*) that the Testament exhibited is the true, whole and last Testament of the party deceased [d], the Judge doth thereupon, and sometimes upon lesser proof, annex his probate and seal to the Testament, whereby the same is confirmed *.

[d] Sta.H.8.an.21. c.5.

* Quæ omnia frequentissima passim observatione fieri plusquam est manifestum.

When (3) the Testament is to be proved *in form of Law*, it is requisite that such persons as have interest [f], that is to say, the widow and next of kin to the deceased, to whom the Administration of his goods ought to be committed, if he had died intestate [g], are to be cited to be present at the probation and approbation of the Testament [h], in whose presence the Will is to be exhibited to the Judge, and petition to be made [i] by the partie which preferreth the Will [k], and enacted [l] for the receiving, swearing, and examining of the witnesses upon the same, and for the publishing and confirming thereof [m]. Whereupon Witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not onely upon the allegation or Articles made by the party producing them, but also upon interrogations minister'd by the adverse party [n]; and their depositions committed to writing [o]: afterwards the same to be published; and in case the proof be sufficient, the Judge doth by his sentence or decree pronounce for the validity of the Testament [p].

[f] Bald.in L. 2. C. de testa. n. 2.Sichard.in eand.L.

[g] Sta.H. 8. an.21.c. 5. Ethi quidem,ut videtur, citandi sunt nominatim; licet, si incertum sit quis succedere debeat ab intestato,sufficit citatio generalis omnium, scilicet quorum interest.Sichar.post Bald. in d. L. 2. Kling. de testa. ordin. Instit.n. 10. & n. 14.

[h] Alias quoad non citatos, nullum facit præjudicium. Paul. de Castro consil.96.vol.1.Sichard.in d.L.2.n.4. Grass.Thesaur.com. op. § testamen. q. 6. 61. Kling. ubi supr. [i] Non tamen requiritur libellus, vel litis contestatio. Sichard in d. l. 2. n. 7. in fin. Simo de Prætis de interp. ult. vol. l. 2. dub. 2. fol. 3. l. 4. [k] Nec refert an sit Executor, vel fidei commissarius, vel legatarius; vel an futurus sit reus, an actor: quamvis contrarium quoad legatarium respondeat Paris. cons. 24.vol.3. sed male, ut per Simo. de Prætis ubi supra. [l] Bald. in d. L.2.C.de testa. n. 3. ubi assignat rationem. [m] Formam petic. vide apud Sichard. in d. l. 2. n. 2. [n] Bald. Alex. & Sichard. in d.L.2. [o] Bald. Alex. & Sichard. in d. L. 2. [p] Non tamen opus est sententia definitiva in scriptis, sed interlocutoria. Bald. Alex. Castrens. & alii in d. L. 2.

Which (4) two forms being compared together, we may easily perceive the differences betwixt the one and the other: of which differences I suppose this to be of the greatest moment, that in the vulgar form, such as have interest are not cited to be present at the probation of the Will; whereas observing the form of Law, they are to be cited to that end. Which difference of form worketh this diversity of effect; namely, that the Executor of the Will proved in the absence of them which have interest, may be compelled to prove the same again in due form of Law [q]. And if the Witnesses be dead in the mean time, it may indanger the whole Testament [r]; especially if ten years be not past since the probation, whereby necessary solemnities are presumed to have been observed †. Whereas the Testament being proved in form of Law, the Executor is not to be compelled to prove the same any more: and although all the Witnesses afterwards be dead, the Testament doth still retain his full force [t].

[q] Paul. de Castr. consil. 96.vol.1.Simo de Prætis de interp. ult. vol. l. 2. dub. 2. soluc.3. fo.207. n. 4. & 5.

[r] Paul. de Castr. d. consil. 96.DD. in l.2. C. de testa.

† L.filius famil.C. de petic.hæred.nisi forte contrarium probetur ex inspectione actor.

[t] L.2.C. de testam. Socin. Jun.consil. 89. vol.1.Kling.in tit. de testa. ordin.l.2.inst. n.10.

Here

Here a queſtion not to be neglected may be demanded; What if a Teſtament being made in writing, and afterwards loſt by ſome caſualty, they to whom the Adminiſtration of the goods of the deceaſed ſhould belong, if the party deceaſed made no Executors, but died inteſtate, ſhould call the Executors either to prove the Will of the deceaſed in ſolemn form of law, (in caſe he made any ſuch Will,) or elſe to ſhew cauſe, wherefore the Adminiſtration of the deceaſed's goods ſhould not be committed unto them? whether may this Will written and loſt be proved by witneſſes, yea or nay? Whereunto my anſwer is, that albeit the very original Teſtament be loſt, yet if there be two witneſſes, which did ſee and reade the Teſtament written, and do remember the contents thereof, theſe two witneſſes, ſo depoſing the tenour of the Will, are ſufficient || for the proof thereof in form of Law, ſo that they be otherwiſe, as well in reſpect of their skill as of their integrity, greater then all exception; and ſpecially ſome other likelihoods concurring therewithall to make their Teſtimony more credible *.

|| Vide Bar. in d. tract. de teſtib. n. 38. & Maſcar. de probac. concl. 1074, 1075, 1076, & 1077. ubi copioſe de mortis probation. ſcriptum invenies;

* Simo de Prætis de interp. ult. vol. l. 2. fo. 204. n. 82. per doctrinam Bart. communiter approbat. in Auth. ſi quis in aliquo. C. de edendo.

Beſides (5) theſe forms of proving Teſtaments above recited, which are referred to that kind of probation which is called *Publicatio Teſtamenti* [v]; there is yet another form, which is called *Apertura Teſtamenti* [x], which form doth reſpect written or cloſed Teſtaments [y]: in the making whereof, amongſt many other ſolemnities, the Civill Law did require that the witneſſes ſhould put to their ſeals; and after the death of the Teſtator, at the opening of the written or cloſed Teſtament, the ſame Law did alſo require, that the ſame witneſſes ſhould be called by the Magiſtrate to acknowledge their ſeals [z], or to deny the ſealing [a]. But as we do not obſerve that ſolemnity of the Civill Law in the ſealing of the Teſtaments by the witneſſes, no more do we obſerve that ſolemnity which the Civill Law requireth in opening of Teſtaments ſealed; unleſs this may ſeem to have ſome reſemblance with this third form, *de apertura Teſtamenti*, which is enacted in the Statutes of this Realm; *viz.* That the Biſhop or Ordinary, or other perſon having authority to take probate of Teſtaments, upon the delivery of the ſeal and ſign of the Teſtator, do cauſe the ſame ſeal to be defaced, and thereupon incontinent re-deliver the ſame ſealed unto the Executor or Executors, without claim or challenge thereunto to be made, &c [b].

[v] De qua in d. L. 2. C. de teſta.

[x] De qua in L. 1. ff. quemadmodum teſt. app.

[y] L. 1. & 2. quemadmodum teſt. app. ff. & D D. in L. 2. de teſta. C.

[z] l. 4. ff. quemadmodum teſta. app.

[a] L. 5. eod. tit. quemadmodum.

[b] Stat. H. 8. an. 21. c. 5. Crederem tamen hujuſmodi verba ſtat. non referre veterem illam formam de apertura teſtamenti; ſed potius, quoniam multa ſolent aſtute fieri quando ſigill. mortui interceptum eſt, eapropter ſtat. caveri, ut ſigil. ad Judicem deducatur, ut ipſius forma ab eodem pervertatur; materia autem Executori ſtatim reſtituatur. Haddon de reformatione legum Eccl. tit. de teſta. c. 19.

Furthermore (6) it is to be noted, that in what manner ſoever the Teſtament be proved, the Executor, before he be admitted by the Ordinary to execute, and before he have the Will under the ſeal of the Or-

dinary, is to promise by virtue of his oath, and, if it be behovefull, also to enter into bond, to make a true account, when he shall be thereunto lawfully called by the Ordinary [c].

[c] Stat. § & postquam. de test. l. 3. provin. const. Cant.

§ XV. What Fees are due for and about the probation and approbation of Testaments.

1. *Where the clear goods do not exceed the value of five pound, onely six-pence is due to the Register.*
2. *Where the clear Goods, being above five pound, do not amount to forty pound, onely three shillings six-pence is due*; viz. *two shillings six-pence to the Ordinary, and twelve-pence to the Register.*
3. *Where the clear goods exceed forty pound, there five shillings is due*; viz. *two shillings six-pence to the Ordinary, and two shillings six-pence to the Register.*
4. *What fees are due for the copies of Testaments or Inventories.*
5. *The penalty whereinto they fall which offend by extorting greater fees then are here limited.*

[a] Stat. H. 8. an. 21. cap. 5.

IT is enacted and established by the Statutes of this Realm [a], "That "from the first day of *April*, *Anno Domini* 1530. (1) nothing shall "be demanded, received or taken, by any Bishop, Ordinary, Archdeacon, Chancellour, Commissary, Officiall, nor any other manner "of person or persons whatsoever they be, which now have, or at any "time hereafter shall have, authority or power to take or receive probation, insinuation or approbation of Testament or Testaments, by "himself or themselves, nor by his or their Registers, Scribes, Preisers, "Summoners, Apparitors, or by any other of their Ministers, for the "probation, insinuation and approbation of any Testament or Testaments, or for any writing, sealing, preising, registring, fines, making "of Inventories, and giving in of acquittances, or for any other manner of cause concerning the same, where the goods of the Testator of "the said Testament, or person so dying, do not amount clearly over "and above the value of an hundred shillings sterling; except onely "to the Scribe, to have for writing the probate of the Testament of him "deceased, whose goods shall not be above the same clear value of an "hundred shillings, six-pence; and for the Commission for the ministration of the goods of any man deceasing intestate, not being above "like value of an hundred shillings clear, six-pence. And that nevertheless the Bishop, Ordinary, or other person or persons having power "and authority to take or receive the probation or approbation of Testaments, refuse not to approve any such Testament, being lawfully "tendred or offered to them to be proved or approved, where the "goods of the person so dying amount not to above the value of an "hundred shillings sterling: so that the same Testament be exhibited

"by

" by him or them in writing, with wax thereunto affixed ready to be " ſealed, and that the ſame Teſtament be lawfully proved before the " ſame Ordinary (before the ſealing) to be the true, whole, and laſt " Teſtament of the ſame Teſtator, in ſuch form as hath been common- " ly accuſtomed in that behalf.

" And when (2) the goods of the Teſtator do amount over and a- " bove the clear value of an hundred ſhillings, and do not exceed the " ſum of forty pound ſterling, that then no Biſhop, Ordinary, or other " kind of perſon or perſons, whatſoever he or they be, now having, or " which hereafter ſhall have, authority to take probation or approbati- " on of any Teſtament or Teſtaments, as is afore ſaid, by themſelves, " or any of their ſaid Regiſters, Scribes, Preiſers, Summoners, Appa- " ritors, nor any other their Miniſters, for the probation, inſinuation " or approbation of any Teſtament or Teſtaments, or for the regiſtring, " ſealing, writing, preiſing, making of Inventories, giving of acquit- " tances, fines, or any other thing concerning the ſame, ſhall take, or " cauſe to be taken, of any perſon or perſons, but onely three ſhillings " ſix-pence, and not above: whereof to be to the Biſhop, Ordinary, " or to any other perſon or perſons having power and authority to take " probation and approbation of any Teſtament or Teſtaments, for him " or his Miniſters, two ſhillings ſix-pence, and not above; and twelve- " pence, reſidue of the ſame three ſhillings ſix-pence, to the Scribe, for " the regiſtring of the ſame.

" And where (3) the goods of the Teſtator, or perſon or perſons ſo " dying, do amount over and above the clear value of forty pound " ſterling, that then the Biſhop nor Ordinary, nor other perſon or per- " ſons now having, or which hereafter ſhall have, power or authority " to take probate of Teſtaments, as is afore ſaid, by him or themſelves, " or any of his or their Regiſters, Scribes, Preiſers, Summoners, Appa- " ritors, or any other their Miniſters, for the probation, inſinuation " and approbation of any Teſtament or Teſtaments, or for the regiſtring, " ſealing, writing, preiſing, making of Inventories, fines, giving of ac- " quittances, or any thing concerning the ſame probate of Teſtaments, " ſhall, from the ſaid firſt day of *April* take, or cauſe to be taken, of any " perſon or perſons, but onely five ſhillings, and not above: whereof " to be to the ſaid Biſhop, Ordinary, or other perſon having power to " take the probation of ſuch Teſtament or Teſtaments, for him and " his Miniſters, two ſhillings ſix-pence, and not above; and two " ſhillings ſix-pence, reſidue of the ſame five ſhillings, to be to the " Scribe for regiſtring of the ſame; or elſe the ſame Scribe to be at his " liberty to refuſe two ſhillings ſix-pence, and to demand and have for " writing of every ten lines of the ſame Teſtament, whereof every line " to contain ten inches in length, one peny.

" And in (4) caſe any perſon or perſons, at any time hereafter, re- " quire a copie or copies of the ſaid Teſtaments ſo proved, or of the " ſaid Inventory ſo made, that then the ſaid Ordinary or Ordinaries, " and the other perſons having authority to take probate of Teſta- " ments, or their Miniſters, ſhall from time to time, with convenient

" ſpeed,

" ſpeed, without any fruſtratary delay, deliver, or cauſe to be delive-
" red, a true copie or copies of the ſame to the ſaid perſons ſo deman-
" ding them, or any of them; taking for the ſearch, and for the ma-
" king of the copy, either of the ſaid Teſtament or Inventory, but
" onely ſuch Fee as is before reherſed, for the regiſtring of the ſaid Te-
" ſtament; or elſe the ſaid Scribe or Regiſter to be at his election, to de-
" mand, have and take, for every ten lines thereof, being full in pro-
" portion before reherſed, one peny.

" Provided always, that where any perſon or perſons, having power
" or authority, have uſed to take leſſe ſums of mony then is above ſaid
" for the probate of Teſtaments, Commiſſions, or Adminiſtrations, or
" other cauſe concerning the ſame, they ſhall take or receive ſuch ſum
" or ſums of mony, for the probate of Teſtaments and Commiſſions,
" or the Adminiſtrations, and other cauſes concerning the ſame, as
" they before the making of this Act have uſed to take, and not above.

" And it is enacted, (5) That every Biſhop, Ordinary, Archdeacon,
" Chancellour, Commiſſary, Officiall, and other perſon or perſons
" having, or they which hereafter ſhall have, authority to take probate
" of Teſtaments, their Regiſters, Scribes, Preiſers, Apparitors, and all
" other Miniſters whatſoever they be, that ſhall doe, or attempt to be
" done and attempted, againſt this Act or Ordinance in any thing,
" ſhall forfeit for every time ſo offending to the partie grieved in that
" behalf, ſo much mony as any ſuch perſon aboveſaid ſhall take contra-
" ry to this preſent Act; and over that, ſhall loſe and forfeit ten pound
" ſterling, whereof the one moiety ſhall be to the King, and the other
" moiety to the party grieved in that behalf, that will ſue in any of
" the King's Courts for the recovery of the ſame: in which Action no
" eſſoin ſhall be admitted or allowed.

Reſolutions upon the Statute 21 H. 8. *c.* 5.

IF a man makes his Teſtament in paper, and dieth poſſeſſed of goods and chattels above the value of forty pound, and the Executor cauſeth the Teſtament to be tranſcribed in parchment, and bringeth both to the Ordinary, &c. to be proved; it is at the election of the Ordinary, whether he will put the Seal and Probate to the Original in paper, or to the Tranſcript in parchment: but whether he put them to the one or the other, there can be taken of the Executor, &c. in whole but five ſhillings, and not above; viz. two ſhillings ſix-pence to the Ordinary, &c. and his Miniſters, and two ſhillings ſix-pence to the Scribe for regiſtring the ſame; or elſe the ſaid Scribe to be at his liberty to refuſe thoſe two ſhillings and ſix-pence, and to have for writing every ten lines of the ſame Teſtament, whereof every line to contain ten inches, one peny.

If the Executor deſire that the Teſtament in paper may be tranſcribed in parchment, he muſt agree with the party for the tranſcribing: but the Ordinary, &c. can take nothing for it; nor for the Examination

tion of the Tranſcript with the Original, but onely two ſhillings ſix-pence for the whole duty belonging to him.

When the goods of the dead do not exceed an hundred ſhillings, the Ordinary, &c. ſhall take nothing; and the Scribe ſhall have onely for writing of the Probate ſix-pence; ſo that the ſaid Teſtament be exhibited in writing, with wax thereunto affixed, ready to be ſealed.

Where the goods of the dead do amount unto above the value of a hundred ſhillings, and do not exceed the ſum of forty pound; then ſhall be taken for the whole but three ſhillings ſix-pence, whereof to the Ordinary, &c. two ſhillings ſix-pence, and twelve-pence to the Scribe for regiſtring the ſame.

Where by cuſtom leſs hath been taken in any of the caſes aforeſaid, there leſs is to be taken: and where any perſons require a Copy or Copies of the Teſtament ſo proved, or Inventory ſo made, the Ordinary, &c. ſhall take for the ſearch, and making of the Copy of the Teſtament or Inventory, if the goods exceed not a hundred ſhillings, ſix-pence; and if the goods exceed a hundred ſhillings, and exceed not forty pounds, twelve-pence; and if the goods exceed forty pounds, two ſhillings ſix-pence; or to take for every ten lines thereof, of the proportion aforeſaid, one peny [a].

[a] M. 6 Jac. rot. 1301. C. B. inter *Edward Neale* informer, &c. & *Jacobum Rouſſe* Officialem infra Archidiaconatum de Huntington def. per l'chiefe Juſtice, *Walmeſly*, *Warburton*, *Daniel* & *Foſter*. Inſt. part 3. fo. 149. Inſt. part 4. fo. 336.

Officialis indictatus de citando & affligendo plurimos, non poteſt dedicere; & petit quod admittatur ad finem [b].

[b] M. 22 E. 3. coram rege, rot. 181. Eborum.

If a Biſhop, or other Eccleſiaſticall Judge or Miniſter, doth exact a Bond or Oath of any perſon in any Eccleſiaſticall caſe, not warrantable by law; the Bond is void, and this Exaction is puniſhable by fine. The Record is long, but worthy to be read [c].

[c] Rot. Parl. 8 H. 4. n. 15, 16, 17, 18, 19, 20.

Contra Sequeſtratores, Commiſſarios, & alios Officiales Epiſcoporum, pro captione fœdorum pluſquam debent pro teſtamentis probandis [d].

[d] H. 13 E. 3. coram Rege.

If the Executor requeſt any to ingroſs the Teſtament, he muſt agree with him he doth ſo requeſt, or bring one ready ingroſſed with him; which for preventing of more fees then by the Stat. is adviſed as a ſafe and ready way *. *Nota*, that by the ſaid Stat. neither the monies raiſed of lands appointed by the Will to be ſold, nor the profits thereof, are to be accounted as any of the Teſtator's goods or chattels.

* Inſt. part 4. fo. 336.

§ XVI. Of the payment of Debts, Legacies, and Mortuaries.

1. *Many questions about the payment of Debts and Legacies.*
2. *What Debts are first to be discharged.*
3. *Of Debts due to the King.*
4. *Of Judgements and Condemnations.*
5. *Of Debts due by Recognizance and Statute Merchant.*
6. *Of Obligations.*
7. *Of Bills and Books.*
8. *Of debts without Specialty.*
9. *Whether the Executor may allow his own debt.*
10. *Of paying part, and receiving an acquittance for the whole debt.*
11. *Of paying the Testator's debts with the Executor's own mony.*
12. *Of Mortuaries.*
13. *No Mortuary to be taken but in certain cases, and that under a certain pain.*
14. *No Mortuary due where the movable goods do not extend to ten Marks.*
15. *No Mortuary due but in those places where they have been used to be paid.*
16. *One onely Mortuary due, and that in the place of the most abiding of the deceased.*
17. *Three shillings four-pence due for a Mortuary, where the movable clear goods do exceed ten Marks, but do not amount to thirty pound.*
18. *Six shillings eight-pence due for a Mortuary, where the clear movable goods extend to thirty pound or above, and be under forty pound.*
19. *Ten shillings due for a Mortuary, the clear movable goods extending unto forty pound or above.*
20. *Divers persons discharged of Mortuaries.*
21. *Other interpretations extending and limiting this Statute concerning Mortuaries.*

HOW (1) far the Executor is bound to pay Debts and Legacies [a]; how the payment of Debts is to be preferred before Legacies [b]; how Legacies are to be paid out of the dead's part [c]; how the dead's part is sometimes the whole clear goods, sometimes half, and sometimes but a third part [d]; also whether in case the Legacies do exceed the dead's part, it be in the election of the Executor to prefer one Legacy before another, or what other order is to be taken [*]: all these things are more fully heretofore declared, and need not here to be iterated. It (2) remaineth therefore that in this place be shewed, which debts are first to be discharged,

[a] Supra eod. par. § 3.
[b] Supr. part. 3. § 16.
[c] Eod. § 16.
[d] Eod. § 16.
[*] Sup. par. 3. § 17.

charged, in case there be not sufficient goods and chattels to pay all the Testator's debts; or whether it be in the power of the Executor to pay which debts he will; and if any remain clear, then whether Mortuaries are to be paid, and how much is to be paid for Mortuaries.

First of all therefore, (3) I suppose that the debt due by the Testator *to the King* is to be discharged, and that it is not in the choice of the Executor, to prefer any other debt due to any Subject [f].

[f] Magna charta, c. 18. Quod verum est, non solum in actionibus personalibus, sed etiam in hypothecariis, saltem jure quo nos utimur; utcunque jure Civili, ex hypothecariis creditoribus prior tempore, potior jure.

Which must be understood of such debts as are due to the King onely by matter of record, and not of sums of mony due to the King upon Wood-sales or sales of his Minerals, for which no obligation is given; or of amercements in his Courts Baron or Courts of his Honours, which be not Courts of record; or of fines for Copyhold estates there; or of forfeitures to the Crown of debts by contract due to any subject by utlary or attainder, untill office thereupon found *. If the Executor be sued by any Subject for a debt, he may plead in bar, that his Testator died so much indebted unto the King, shewing how, &c. and that he hath not *ultra* to satisfie the debt †. If he hath no day in Court to plead this, then the Executor is put to his *Audita querela*, wherein he must set forth the special matter.

* *Office of Executor*, fo. 206.

† M. 33, 34 Eliz. the Lady *Walsingham's* case in C. B.

Secondly, (4) (if yet there remain sufficient goods and chattels,) before other personall debts, whether they be due by Obligation, Bill, or otherwise, *Judgements* and *Condemnations* are to be discharged [g].

[g] Brook Abridg. tit. exec. n. 172. Doct. & Stu. l. 2. c. 10. D. Coke l. 4. fo. 60.

It is no plea for a Creditor by Statute, to say that his Statute was acknowledged before the Judgment, and so more ancient: for a Judgment, though later, is to be preferred before a Statute in time precedent ‖. But if this Judgment be satisfied, and is onely kept on foot to wrong other Creditors, or if there be any defeasance of the Judgment yet in force; then the Judgment will not avail to keep off other Creditors from their debts *. If there be two Judgments against the Testator, precedency or priority of time is not materiall, but he that first sueth out execution shall be preferred, and before execution the Executor may satisfie which he pleaseth first. And it is not necessary that the Judgment be limited to the Courts at *Westminster*, but if it be obtained in any Court of record, which hath power to hold plea by charter or prescription of debt above forty shillings, it is sufficient. For though upon such a Judgement execution cannot be there had, but of such goods as are within the jurisdiction of that Court; yet if the record be removed into Chancery by a *Certiorari*, and there by *Mittimus* into one of the Benches, then execution may be had upon any goods in any County of *England*.

‖ Dy. 32. M. 32 Eliz. *Pembertons* case. lib. 4. the Sadlers case.

* Lib. 5. fo. 28. lib. 8. fo. 132.

Thirdly, (5) the debt due upon *Statute Merchant and Recognisance* is to be discharged (if there be assets) before any personal debt [h]: for that by force of the Recognisance, not onely the person of the Debtor is bound, but also after the day of payment is expired, the movables of the Debtor may be apprehended and sold for the payment of the debt [i].

[h] Quibus enim res obligatæ sunt, sunt illi potiores quam creditores qui personali tantum actioni incumbunt. L. cos. C. qui potiores in pig.

[i] Anno 13 Ed. 1.

Judgements in a Court of record shall be paid before Statutes, which are but private Records, and also before Recognisances acknowledged by assent of parties. A debt due upon a Judgment, though it be a later debt, shall be paid before a precedent debt due by Recognisance or Statute: for though they be both records, yet the Judgment in the King's Court upon Judiciall proceedings is more eminent in degree †.

† M. 32 Eliz. C. B. *Pemberton* and *Barhams* case. C. lib. 4. the case of the Wardens and Comminalty of Sadlers. Lib. 5. fo. 28. *Harrisons* case.

A Statute and Recognisance standing in equal degree, it is at the Executor's election to give precedency to which he will: neither between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though touching the Lands of the Conusor it doth: but as for the Goods in the hands of the Executor, he who first seiseth them by execution is preferred; and before suing of Execution, the Executor may give precedency to which he will.

If there be a Judgment, Statute, or Recognisance for performance of Covenants, and no Covenant broken, an obligation for payment of present mony shall be discharged before it ‖.

‖ H. 40 Eliz. C. B. rot. 119. Lib. 5. fo. 28.

If there be several Obligations for the payment of mony, the time in one was come at the time of the Testator's death, and not so upon the other, if when the mony is payable, he forbear to sue for his debt, untill the other Obligation become payable; it is in the election of the Executor to pay which he pleases first: for it is the commencement of the suit onely which entitles to priority of payment; or at least restrains the Executor's election. Therefore an Executor may not pay a debt of equal degree to a Creditor that brings no Action for the same, after another Creditor hath brought his Action *.

* Dr. and Stud. lib. 2. c. 10. 29 H. 8. Dy. fo. 32.

Fourthly, (6) (if the goods and chattels will suffice) *Obligations* are to be discharged [k]. And if there be divers Obligations, then it seemeth to be in the power of the Executor, to discharge which Obligation, and to gratifie which of the Creditors he will [l]; which being done, the other Creditors be without remedy, if there be no assets. Unless the day of payment in the one Obligation be expired, and the day of payment of the other Obligation is not yet come; in which case the former Obligation is to be first satisfied [m]: or unless there be suit commenced for some Obligation; for then it is not in the power of the Executor to discharge another Obligation, for the which no action is brought, in prejudice of the former suit [n]. But if there be two Obligations, and the two severall Creditors bring severall actions against the Executor, he that first obtaineth judgement must be first satisfied [o]. Yet a debt due upon Record may be paid depending the Action [p].

[k] Brook d. n. 172.

[l] Brook ubi supr. Do. & Stud. l. 2. c. 10.

[m] Brook d. tit. exec. n. 172. Labridg. dez cases edit. An. Dom. 1599. fo. 174. pag. 2. n. 4. 28 H. 8. Dy. fo. 32.

[n] Brook d. n. 172.

[o] D. Labridg. dez cases, fo. 174. p. 2. n. 6.

[p] Brook eod. n. 172.

Fifthly,

Fifthly, (7) after Obligations (ſuppoſing ſufficiencie of goods) debts due upon *ſimple Bills*, or *Merchants Books*, or other like *Specialties*, are to be diſcharged [q].

[q] Doct. & Stu. l. 2. cap. 10.

Howbeit of theſe laſt recited Specialties, Bills are of the nature of an Obligation. For when a man maketh ſuch an Obligation, namely, *This Bill witneſſeth, that I* A. B. *have borrowed ſo much mony of* C. D. without ſaying more, this ſhall charge the Executor as well as an Obligation; ſo that the Teſtator, if he had been alive, could not have waged his Law againſt this Bill. For theſe words, *recepiſſe*, or *debere*, or *teneri ad ſolvendum* ten pound, do make a good Obligation, and ſhall bind the Executor; for every word which proveth a man to be debtor, or to have another's mony in his hand, though it be by Bill, yet ſhall it charge the Executor *.

* Fulb. l. 2. paral. fol. 30.

Finally, (8) if the Creditor have no *Specialtie*, or writing, it ſeemeth that the Executor is not bound by the Laws of this Realm to pay the ſame, albeit he had aſſets in his hands, (ſaving ſervants wages [r];) becauſe in every caſe where the Teſtator might wage his Law, no action lieth againſt the Executor †. Howbeit an Action of the caſe may be brought againſt the Executor, upon the promiſe or aſſumption made by the Teſtator in his life-time by word onely, without writing, if there be aſſets [t]. But if there be no aſſets to ſatisfie all theſe aforeſaid Creditors, then obſerving the Order aforeſaid, beginning with the payment of the debt due to the King, and ſo forward, I ſuppoſe it is a diſcharge againſt the reſt [v]. Otherwiſe it is dangerous to the Executor, if he pay debts without Specialty before thoſe debts which are due upon Specialty, or if he diſcharge Obligations before Judgements *, &c.

[r] Brook tit. exec. n. 87. 163.

† *Terms of law*, verb. exec.

[t] Brook tit. exec. n. 71. Lib. 4. *Slades* caſ.

[v] Quod facto inventario ſine impedimento procedit, aliàs ſecus, ſi reſpiciamus jus civile. L. ſcimus. § & ſi præfatam. idque ob præſumptam fraudem. * Brook, Do. & Stu. locis ſupradictis.

But here it may be demanded, what if the Teſtator were indebted to the Executor, whether may (9) the Executor allow his own debt, in prejudice of other Creditors? By the Civill [x] and our Eccleſiaſticall [y] Laws, he is in the ſame caſe as other like Creditors. And I ſuppoſe alſo that, by the Laws of this Realm, he may allow his own debt in prejudice of other like Creditors [z], in caſe he have made an Inventory, and in caſe he be not Executor of his own wrong *.

[x] L. ſcimus. § in computatione. C. de jure delib.

[y] C. ſtat. § ſtatuimus. de teſta. l. 3. provinc. conſt. Cant.

[z] Plowd. in caſ. inter *Woodward* & *Darcy*: licet contrarium teneat Brook tit. exec. n. 57. 59. 112. 114. 118. cujus opinio communiter hodie reprobatur, ut non ſemel mihi nunciarunt juriſperiti hujus Regni Angliæ non pauci, nec mediocriter docti. * D. Coke l. 15. relat. fol. 30.

But he muſt obſerve that the debts be of an equal degree. For if the Teſtator be indebted to other men by Judgement or Statute, and to the Executor onely by Bond, then he may not firſt pay himſelf, unleſs there be goods ſufficient to pay both him and them. Pl. Com. fo. *Woodward* and *Darcies* caſ. Lib. 5. fo. 30.

Furthermore, it is to be noted in this place, (10) if the Executor pay to ſome of the Creditors part of the debt due by the Teſtator, and receive an acquittance for the whole; as if the Teſtator be indebted to one in forty pound, whereof the Executor payeth but ten pound, and nevertheleſs taketh an Acquittance of the whole forty pound; this Acquittance ſhall not prejudice any other Creditor, but for ten pound onely [a].

[a] Brook tit. aſſets, n. 1. & tit. exec. n. 6.

If there be 2 Creditors in equall degree, and both ſue, if the Executor doth by Covin help that Creditor which began his ſuit laſt to his Judgment or Execution firſt, and there be no aſſets left to pay the other Creditor; he muſt be ſatisfied out of the Executor's own eſtate, if this Covin be proved againſt him. But the confeſſion of an Action by the Executor, where there is a reall debt, is no Covin: and ſuch recovery by confeſſion is a good plea for the Executor againſt another Creditor. 5 H. 7. 27. P. 39 Eliz. C. lib. Intrat. fo. 269. 41 E. 3. Fitz. executor, pl. 68. 7 Eliz. Dy. fo. 232. 21 H. 7. Kelw. fo. 74.

If an Executor or Adminiſtrator compound for 40 l. with one who hath a Judgment for 100 l. this underhand compoſition ſhall not prejudice any other Creditor who is a ſtranger to it: for every Executor or Adminiſtrator ought to execute his office lawfully in paying debts, duties, and legacies, in ſuch precedency as the Law requires; and an agreement made between them and others ſhall not be to the prejudice of a third perſon. Lib. 8. fo. 132. *Turners* caſe.

A man is condemned in debt, and dies before execution had; *per Curiam*, the Adminiſtrator or Executor is bound to pay this debt upon record before Specialties. Dy. fo. 80.

Moreover it is to be noted, that this hath been delivered and received for Law, *viz.* that if (11) the Executor did pay with his own mony ſo much of the Teſtator's debts as the value of the Teſtator's goods or chattels did ariſe unto, and retain in his hands the Teſtator's goods or chattels; then ſuch payment ſhould not prejudice the other Creditors to whom the Teſtator was indebted, but ſhould charge the Executor as aſſets [b]: and therefore, that it behoveth the Executor to alienate the goods of the Teſtator for the payment of his debts, if he would be ſafe from paying any more debts then the goods of the Teſtator did extend unto [c]. Howbeit at this preſent the contrary opinion ſeemeth to prevail in this our Realm; namely, that the Executor paying the juſt value of the Teſtator's goods to the Creditors, may retain the ſame goods in his hands, which nevertheleſs ſhall not charge the Executor as aſſets [d].

[b] Brook abridg. tit. aſſets, n. 8. tit. exec. n. 116. 150. tit. admin. n. 37. 38. 51. Lind. in c. ita quorundam. ver. ſibi. de teſta. l. 3. provinc. conſt. Cant.

[c] Brook & Lind. ubi ſupra. Quibus adjungas Sichar. in L. ult. § & ſi præfatam. n. 11, 12. C. de jure delib.

[d] Dyer fol. 2. & fol. 187.

In an Action of debt brought againſt an Adminiſtrator, it was the opinion of the Court, that he might retain moneys in his own hands of the inteſtate, to ſatisfie a debt due to himſelf. M. 11 Jac. C. B. *Bond* and *Greenes* caſ. Godb. rep. fo. 216. Lib. 5. fo. 29. *Coulters* caſe.

And ſo may an Executor. Pl. 184. 20 H. 7. Kelw. fo. 58. M. 2 Eliz. Dy. 187.

If the Teſtator be indebted to A. by bond in 20 l. if his Executors make a ſufficient Obligation to the Teſtator's Creditor, and ſufficient-

ly

ly diſcharge the Teſtator without covin, they may retain the goods for ſo much, and the goods retained ſhall not be aſſets in their hands; yea though they have appointed *ulteriorem diem* for the payment of the mony *.

S. brought debt againſt J. S. as Executor to B. who pleaded fully adminiſtred, &c. to which the plaintiff replied, that he had goods of the Teſtator's to the value of 200 marks; which the other confeſſed, and gave in evidence, that he had paid as much of his own proper mony for the Teſtator's debts, and ſhewed how. Reſolved, that it might well be given in evidence, and that the property of the deceaſed's goods by payment of the Teſtator's debts to the value of the ſaid goods is altered; and the property being altered to the uſe of the deceaſed, it is a juſt Adminiſtration †.

If a Teſtator morgages a leaſe for years, and dies, his Executors may redeem it with their own mony, and the leaſe ſhall be aſſets in their hands, for ſo much as the leaſe is worth above the ſum which they paid for redemption of it ‖.

Concerning (12) Mortuaries, it is enacted by Authority of Parliament as followeth *. "No (13) Parſon, Vicar, Curat, Pariſh-"Prieſt, ne any other Spirituall perſon, nor the Farmers, Bailiffs, ne "Leſſees, ſhall take, demand, or receive, of any perſon or perſons "within this Realm, or any perſon or perſons dying within this "Realm, for any Mortuary or Corſe-preſent, ne any ſumme or ſumms "of mony, ne any other thing for the ſame, more then is hereafter men-"tioned; ne alſo ſhall convent or call any perſon or perſons before the "Judge ſpirituall, for the recovery of any ſuch Mortuaries or Corſe-"preſent, or any other thing for the ſame, more then is hereafter men-"tioned; upon pain to forfeit for every time ſo demanding, recei-"ving, taking, or conventing or calling any ſuch perſon or perſons "before any Spirituall Judge, ſo much value as they ſhall take above "the ſame limited by this Act; and over that, forty ſhillings to the "party grieved contrary to this Act: for the which forfeiture, the "party ſo grieved contrary to this Act ſhall have an Action of debt by "Writ, Bill, Plaint, or Information, in any of the King's Courts, "wherein no wager of Law, &c. ſhall be allowed.

"Firſt, (14) it is enacted; That no manner of Mortuary ſhall be "taken or demanded of any ſuch perſon, whatſoever he be, which at "the time of his death hath no movable goods but under the value of "ten Marks.

"Alſo (15) that no Mortuary ſhall be given or demanded from hence-"forth of any manner of perſon, but onely in ſuch place as a Mortuary "heretofore hath been uſed to be payed and given; and in thoſe "places none otherwiſe but after the rate and form hereafter men-"tioned.

"Ne (16) that any perſon pay Mortuaries in more places then one, "that is to ſay, in the place of their moſt dwelling and habitation; and "there but one Mortuary.

* P. 3 Eliz. C. B. *Stampe* and *Hutchins* caſ. Leon. fo. 111, 112.

† *Shelly* verſ. *Sackville*. Anderſ. rep. part 1. c. 50. 20 H. 7. fo. 2. 4. 5.

‖ T. 32 Eliz. C. B. *Hawkins* and *Louſes* caſ. Leon. 155.

* Stat. H. 8. an. 21. cap. 6.

"Nor

"Nor (17) no Parſon, Vicar, Curate, Pariſh-Prieſt, or other, ſhall "for any perſon dying, or dead, being at the time of his death of the "value of movable goods of ten Marks or more, clearly above his debts "payed, and under the ſumme of thirty pound, take for any Mortuary "more then three ſhillings four-pence in the whole.

"And (18) for a perſon dying, or dead, being at the time of his "death of the value of thirty pound or above, clearly above his debts "payed, in movable goods, and under the value of forty pound, there "ſhall be no more taken and demanded for a Mortuary then ſix ſhillings "eight-pence in the whole.

"And (19) for any perſon dying, or dead, having at the time of "his death of the value in movable goods of forty pound or above, to "any ſumme whatſoever it be, clearly above his debts payed, there ſhall "be no more taken, payed or demanded for a Mortuary, then ten ſhil-"lings in the whole.

"Provided, (20) That for no woman being covert baron, ne child, "nor for any perſon not keeping houſe, any Mortuary be payed, ne "that any Parſon, Vicar, Curate, Pariſh-Prieſt, or other, ask, demand, "or take for any ſuch woman, child, or for any perſon not keeping "houſe, dying, or dead, any manner of thing or money by way of "Mortuary.

"Ne alſo for any way-faring man, or other that dwelleth not ne "maketh reſidence in the place where they ſhall happen to die; but "that the Mortuary of ſuch way-faring perſons be anſwerable in places "where Mortuaries be accuſtomed to be paid, and in manner and form "and after the rate before mentioned, and no otherwiſe, in place or "places where ſuch way-faring perſons at the time of their death had "the moſt habitation, houſe and dwelling places, and not elſe-"where.

"Provided (21) alwaies, That it ſhall be lawfull to all manner of "Parſons, Vicars, Curats, Pariſh-Prieſts, and other Spirituall perſons, "to take and receive all manner ſums of money, or other thing, which "by any manner of perſon dying ſhall fortune to be diſpoſed, given "or bequeathed unto them, or any of them, or to the high altar "of the Church, this Act or any thing therein mentioned notwith-"ſtanding.

"And be it, &c. That no Mortuaries or Corſe-preſents, or any "ſumme or ſumms of money, or other thing, for any Mortuary or "Corſe-preſent, ſhall be demanded, taken, received or had in the "parts of *Wales*, nor in the Marches of the ſame, nor in the Towns of "*Calice* or *Berwick*, or the Marches of the ſame, but onely in ſuch "parts and places of *Wales*, Marches and Towns aforeſaid, where "Mortuaries have been accuſtomed to be taken and payed: and in "thoſe parts and places no Mortuaries or Corſe-preſents, ne any other "thing for Mortuary or Corſe-preſent, from henceforth ſhall be de-"manded, taken, received, or had, but onely after the form, order "and manner above ſpecified in this preſent Act, and none otherwiſe, "ne of any other perſon or perſons, then is limited in this preſent "act,

"act, and none otherwiſe, upon pain above contained in this preſent "Act.

"Provided alſo, That it ſhall be lawfull to the Biſhops of *Bangor*, "*Landaff*, *S. Davids*, and *Saint Aſaph*, and likewiſe to the Arch-"deacon of *Cheſter*, to take ſuch Mortuaries of the Prieſts within "their Dioceſes and Juriſdictions as heretofore hath been accuſto-"med.

"Provided always, That in ſuch places where Mortuaries have "been accuſtomed to be taken of leſs value then is afore ſaid, that no "perſon ſhall be compelled to pay in any ſuch place any other Mortu-"ary then hath been accuſtomed; ne that any Mortuary in ſuch place "ſhall be demanded, taken, received or had, of any ſuch perſon or per-"ſons exempt by this Act, nor in any wiſe contrary to this Act, upon "pain afore limited.

A Mortuary or Corſe-preſent is a gift left by a man at his death to his Pariſh-Church, for the recompence of his perſonal Tithes and Offerings not duly paid in his life-time.

A Mortuary was formerly uſed to be paid by the Executor next to the Heriot, and before the debts. Fleta lib. 2. c. 50. Bracton lib. 2. fo. 60. Britton fo. 178. Inſt. part 1. fo. 185. b.

If a man be ſued in the Spirituall Court for a Mortuary, a Prohibition will lie. Doct. & Stud. lib. 2. c. 55. Though it appeareth by the Stat. 13 E. 1. commonly called *Circumſpecte agatis*, that Mortuaries are ſuable in the Court Chriſtian. In ancient times, if a man died poſſeſſed of 3 or more cattel of any kind, the beſt being kept for the Lord of the fee as a Heriot, the ſecond was wont to be given to the Parſon in the right of the Church. Inſt. part 1. fo. 185. b.

But here it may be demanded, whether the Mortuary ought to be paid before the goods be divided amongſt the wife and the children, (where ſhe hath a widow's part, and they filiall portions, by the Cuſtome of the Countrey;) or it ought to be taken out of the dead's part onely. To which queſtion anſwering, I hold it more agreeable to the Civil and Eccleſiaſticall Law, that it ought to be ſatisfied out of the dead's part, after the diviſion of the deceaſed's goods, according to the Cuſtome of the Country: and my reaſon is, becauſe a Mortuary is of the nature of a Legacy, and termed in Law the principall Legacy. Now ſeeing it is clear that Legacies are to be paid out of the dead's part, therefore the Mortuary is to be paid out of the ſame part *: yet before any other Legacies, and without any defalcation, as well for that it is a principal Legacy, as by force of the foreſaid Statute.

* Mortuarium eſſe legatum, nempe pro anima defuncti relictum, conſtat ex gloſ. in c. conquerente. de offic. ordin. ex. & Hoſtienſ. ibidem, verb. mortuar. ideoque non ex aſſe, ſed ex illa parte quæ dicitur pars defuncti, ſolvendum; nec patitur defalcationem, maxime propter Stat. inde edit.

§ XVII. Of making an accompt; and first, of the neceſſity thereof.

1. *Divers reaſons wherefore Executors are to accompt.*
2. *Whether the Executor be ſubject to accompt, being releaſed by the Teſtator.*

HEre many things may be conſidered [a]: namely, how needfull it is that Executors ſhould be accountable; to whom the account is to be made; within what time; in what manner; and what effects the ſame hath.

How (1) requiſite and needfull a thing it is, that Executors ſhould be charged with the making and rendring of an account; the unfaithfull dealing of a great ſort of faithleſs Executors, to the utter undoing and ſpoiling of many fatherleſs and friendleſs children, is a proof overwell known [b]. Surely, if it ſtand with reaſon, that Stewards, Receivers, Bailiffs, Tutors, Factors, and ſuch as have to deal for other perſons, ſhould be accountable of their Stewardſhip, Receiverſhip, and their other Offices [c]; with greater reaſon may it be maintained, that an Executor ſhould be ſubject to account rather then they: for they for the moſt part have to deal for ſuch as be living, who may have an eye to their doings; but an Executor hath to deal for a dead perſon, who can neither ſee nor hear if his Executor deal unjuſtly. Again, if the Executor have well and faithfully executed his office, and fully diſcharged the truſt repoſed in him, what ſhould move him that he ſhould not willingly make a due account thereof, and thereby obtain an acquittance, and be delivered from the burthen laid upon him [d]? On the contrary, if he have played the unjuſt Steward, much rather in that caſe ought he to be urged and compelled to make his account, that his fraud and deceit being detected, he may be juſtly puniſhed, and others by his puniſhment premoniſhed [*]. By this alſo, that as well the Civill Laws as the Eccleſiaſticall Laws be ſo preciſe in making of Inventories, we may learn the neceſſity in making of an account: for if Executors were not accountable, the uſe of Inventories were to little purpoſe [f].

To conclude, all equall Laws of every well-governed Commonwealth have favoured the execution of Teſtaments and laſt Wills of men deceaſed, and have had ſpeciall care that they ſhould not be fruſtrated: and therefore no man can with ſafe conſcience ſpeak againſt the rendring of an account, or ſeek immunity from the ſame [g]. Inſomuch that if (2) the Teſtator ſhould diſcharge his Executor from making an account; yet nevertheleſs, if the Executor deal fraudulently, the Ordinary may in his diſcretion exact an account at his hands, for the reformation of ſuch fraud [h]. For it is not to be preſumed that the

[a] Super hac materia vid. Jo. de Can. in Tract. de exec. ult. vo. § noviſſimum, n. 4. & Jo. Olden. conſ. Tract. tit. 8.

[b] Argument. à § quoniam, in Authent. ut hi qui oblig.

[c] Jo. de Canib. in d. § noviſſimum, n. 1. Menoch. de arb. jud. l. 2. caſ. 209.

[d] Jo. Olden. tract. de executor. ult. vol. tit. 8.

[*] Olden. ubi ſupra.

[f] Jo. de Canib. in d. § noviſſimum.

[g] Old. d. tract. tit. 8.

[h] Lind. in c. religioſa. verb. rationem. de teſtam. l. 3. provinc. conſt. Cant. Jo. de Athon. in magna gloſſ. in Legatin. libertat. de exec. teſtam. Jo. de Canib. & Jo. Olden. locis ſuperius citatis.

Teſtator,

Teſtator, in granting to the Executor immunity from making an account, did think that the Executor would deal unjuſtly and fraudulently [i], and ſo did not pardon any ſuch injuſtice and fraud, whereof he had no conceit [k]; but rather hoped that the Executor would diſcharge his office with all fidelity, ſo that there ſhould not need any account, and in that reſpect onely (I mean in the caſe of his fidelity) did acquit him from rendering of an account [l].

[i] Lin. Jo. de Canib. & Jo. Olden. ubi ſupr.
[k] L. ſi quis. ff. de leg.
[l] Lind. ubi ſupra.

§ XVIII. To whom the Accompt ought to be made.

1. *The Account is to be made to the Ordinary.*
2. *Whether the Account is to be made to the Creditors or Legataries.*
3. *Whether the Account is to be made to the Co-executor.*

THe (1) accompt is to be made by the Executor Teſtamentary to the Biſhop or Ordinary, to whom the probation of the Teſtament appertaineth [a]: who therefore not unaptly may be termed the Executor of Executors, becauſe he examineth the accompt of every Executor; and the father of the fatherleſs, for that to poor Orphans he is in ſtead of a Father [b], in providing how they may obtain that which is left unto them by the Teſtament of their father or other perſon deceaſed.

And albeit (2) it ſeemeth that the Executor is not tied to make an accompt to the Legataries or Creditors extrajudicially [c]; yet I ſuppoſe that at the inſtance or promotion of ſuch Legataries and Creditors invocating the office of the Judge, he may be compelled to render an accompt to the Ordinary judicially [d].

To (3) this queſtion, whether an Executor be bound to make an accompt to his Co-executor, it is anſwered, That extrajudicially an Executor may exact an accompt of his Co-executor, but not in judgement *: but the Ordinary may call them both, or either of them, to a judiciall accompt [f].

[a] Clem. Unic de teſt. c. Stat. § & poſtq. de teſtam. l. 3. provinc. conſtit. Cant. Jo. de Canib. de Exec. ult. vol. 2. partic. § noviſſimum. Per. L. nulli. C. de Epiſc. & Cleric.
[b] Jo. de Canib. in d. § noviſſimum, n. 9.
[c] Jo. de Canib. in d. § noviſſimum.
[d] Per ea quæ inferius ſcribuntur, ead. part. § 20.
* Lind. in d. c. ſtat. § & poſtquam. verb. rationem, in fin. glo ſ. ibidem.
[f] L. 2. de adminiſtratur. C. Lind. ubi ſupr.

§ XIX. Of the Time of the Accompt.

1. *The Time is left to the diſcretion of the Ordinary.*
2. *Of the generall and particular accompt.*

THe (1) Time appointed for making of the Accompt ſeemeth to be arbitrary, that is to ſay, left to the diſcretion of the Ordinary [a]. And (2) although it may ſeem that the Executor ought not to be called to a generall accompt of his whole Executorſhip, before he have had ſufficient time for the performance of the Will [b], (which is a twelvemonth [c]:) nevertheleſs in the mean time, if the Executor do not adminiſter faithfully, or if the Ordinary think it convenient, the Exe-

[a] Text. in c. ſtat. § & poſtquam. de teſta. l. 3. provincial. conſt. Cant.
[b] Lind. in d. c. § & poſtquam. verb. congrue, & verb. rationem reddere.
[c] L. nulli. C. de Epiſ. & cler. Boi. in c. tua nobis. de teſta. extra. Covar. in c. 3. eod. tit.

cutor may be compelled to make a particular accompt [d]; and ſo in divers reſpects the Law hath appointed the time diverſely.

But whatſoever the Law hath determined herein, it is for the moſt part every-where within this Realm obſerved, that the Executors promiſe to the Ordinary, by virtue of their Oath, to make a true and perfect accompt whenſoever they ſhall be thereunto called by the ſaid Ordinary *; and therefore may be called to a generall accompt within the year [f]: yet I refer the Reader to the ſeverall ſtyles of ſeverall Courts, for his farther information in this behalf.

[d] Lind. in d. c. ſtat. verb. congrue. & verb. rationem reddere. Jo. de Canib. de exec. ult. vol. § noviſſimum, q. 10.

* Text. in d. § poſtquam.

[f] Jo. de Athon. gloſſ. in Legatin. libertat. verb. approb.

§ XX. Of the manner of making an Accompt.

1. *What Proof is requiſite in the Accompt.*
2. *Of the diſtribution of the reſidue.*
3. *Of the office of the Ordinary in the accompt.*
4. *What manner of expences are to be allowed to the Executor.*
5. *Of the Citation in the accompt.*

IF we reſpect what is to be performed by the Executor who maketh the Accompt [a]; he is not onely to declare what goods and chattels belonging to the Teſtator he hath received [b], and what debts and Legacies he hath paid for the Teſtator [c], and to (1) make due proof of every payment, that is to ſay, of leſſer ſumms by his oath, and of greater ſumms by other proofs [d], ſuch as the Ordinary ſhall allow of *: but alſo if (2) any thing do remain of the ſaid goods and chattels [f], the funerals together with the debts and Legacies ſatisfied and diſcharged [g], the ſame ought to be diſtributed, and converted *in pios uſus* [h]. Neither ought the Executor to apply any part thereof to his own private uſe, more then is given him by the Teſtator, or which the Ordinary ſhall allow him for his labour, or for the like conſideration [i]. But of this diſtribution of the reſidue *(in pios uſus)* there is but ſmall uſe in theſe daies, as well for that the reſidue is commonly left to the Executors; as alſo for that the Executors are afraid that ſome unknown debts due by the Teſtator ſhould afterward ariſe, and ſo the Executor be compelled to pay the ſame out of his own purſe.

[a] De forma reddendi rationem præclare Olden. in Tract. de execut. ult. vol. tit. 8. & Menoch. de arb. jud. li. 2. caſ. 209.

[b] Molineus in conſuetud. Pariſ. § 6. gloſ. 6. n. 18.

[c] Molin. ibid.

[d] Jo. And. in addic. ad Specul. de Inſtr. edit. § nunc vero. verſ. quid ſi executor. Lin. in c. ſtatutum. verb. reddere rationem. li. 3. provin. conſtit. Cant. Jo. de Athon. in Legatin. libertat. de executor. teſtam. Maſcard. Tract. de probac. verb. expenſæ. concluſ. 722.

* Menoch. d. caſ. 209. Old. de exec. ult. vol. tit. 8. Maſcard. de probac. concluſ. 720.

[f] L. cum ſervus. ff. de cond. & demon.

[g] Magn. char. c. 18.

[h] In c. ſtatutum. § ſtatuimus. de teſta. lib. 3. provincial. conſtit. Cant. c. cum tibi. de teſta. extr. Plowd. in caſ. inter Norwood & Read. Doct. & Stud. li. 2. c. 10. circa medium. Quod tamen intellige prout ſupra ſcripſi ead. part. § 1 in fin.

[i] Text. in d. § ſtatuimus.

If we reſpect (3) what is to be performed by the Ordinary in the making of this Accompt, I ſuppoſe that it doth appertain unto his office, not onely to examine the Accompt, and to ſee whether the ſame be rightly calculated, and whether the Accomptant do charge himſelf with the receit of the whole goods and chattels of the Teſtator, and how much he hath diſburſed, either for funerals, debts, or Legacies [k]; but

[k] Menoch. d. caſ. 209. Old. d. tit. 8.

but alſo to have a regard what manner of expences the Accomptant requireth to be allowed unto him: for (4) ſumptuous and delicate expences are not to be allowed, but honeſt and moderate, according to the condition of the perſons [l]. And after due examination of the ſaid Account, the Ordinary finding the ſame to be true and perfect, may pronounce for the validity thereof, and ſo acquit the Executor ſo far forth as appertaineth to the Eccleſiaſticall Court [m]. But if, upon the examination of the ſaid Account, it do appear that the Executor hath not dealt faithfully, the Account is to be rejected [n].

But whether (5) we reſpect the office of the Accomptant or of the Ordinary, this is perpetually to be obſerved, that the Creditors to whom the Teſtator did owe any thing, and the Legataries to whom the Teſtator did bequeath any thing, and all others having intereſt, are to be cited to be preſent at the making of the ſaid Account [o]; otherwiſe the Accompt made in their abſence (and they never called) is not prejudiciall unto them [p].

[l] d. c. ſtatutum. § ſtatuimus. Old.d. tit. 8. n. 5.

[m] De qua re attendendus eſt cujuſque fori ſtylus.

[n] Vide infr. § prox

[o] Specul. de Inſtr. edit. § nunc vero aliqua, n. 45. Lind. in d. c. ſtatutum. § & poſt. part. § 14.

quam. verb. ordinarius. [p] L. de unoquoque. ff. de re jud. & DD. ibid. & ſupr. ead.

§ XXI. Of the end and effect of an Accompt.

1. *The making of an Accompt ordained in favourable regard of Teſtaments.*
2. *The effect of a perfect and juſt accompt.*
3. *The effect of an unperfect accompt.*

THe (1) End for which it is ordained, that every Teſtamentary Executor ſhould be ſubject to make an Account, is this, that the lawfull Teſtaments and laſt Wills of them which depart this life ſhould be fully effected and accompliſhed, according to their true and honeſt intents; and that the occaſion of defrauding the dead man, and miſſpending his goods by unhoneſt Executors, might be prevented [a].

The (2) effect which ariſeth of a true and juſt accompt is this; the Executor having well and faithfully performed his office, and made his accompt accordingly, ought to be acquitted and diſcharged from farther moleſtation and ſuits, as one that hath fully adminiſtred and finiſhed his office [b]; neither is he to be called by the Ordinary to any farther account [c].

But this finall (3) diſcharge and acquittance cannot be obtained, untill the Executor have fully adminiſtred and accompted. And if any inferiour Judge (I mean under the degree or dignity of a Biſhop) do grant unto any Executor letters of Acquittance or finall diſcharge, before a lawfull accompt of full adminiſtration and faithfull execution be made, that Judge is *ipſo facto* ſuſpended *ab ingreſſu Eccleſiæ* by the ſpace of ſix months [d]. Beſides that the Acquittance it ſelf doth not benefit the Executor, when it appeareth that he hath not fully and faithfully adminiſtred *.

[a] Jo. de Canib. Tract. de exec. ult. vol. § noviſſimum. Jo. Old. eod. Tract. tit. 8. & ſupr. ead. part. § 17.

[b] Menoch. d. caſ. 209. in fin. Brook Abridg. tit. adminiſt. n. 14.

[c] L. Semel. C. de Apoch. Olden. de exec. ult. vol. tit. 8. n. 17.

[d] c. fin. de teſtam. lib. 3. provincial. conſtit. Cant. in fin.

* Lind. in d. c. fin. verb. acquietanciarum.

§ XXII. Of the Executor refusing the Executorship, and what he is to take heed of.

1. *The Executor resolved to refuse, must not meddle as Executor.*
2. *Who is said to meddle as Executor, or not.*

IF the (1) Executor named in the Testament resolve not to stand to the Executorship, but to refuse the same; then must he beware that he do not administer the goods of the deceased as Executor: for having once administred as Executor, he may at any time after be compelled to undergo the burthen of an Executor [a], and also may be sued as Executor by the Creditors of the Testator; though he cannot sue others as Executor, for that he hath not the Will under the Ordinarie's seal [b].

A (2) man is then said to administer as Executor, so that thereby he may be compelled to stand to the Executorship, when he doth perform those acts which be proper to an Executor [c]; as to pay the debts due by the Testator, or to receive any debts due unto the Testator, or to give acquittances for the same [d], with other such like acts *.

[a] Panor. in c. Johannes. Boi. in c. tua nobis. de testa. extr.

[b] Perkins tit. testament, fol. 93. Plowd. in cas. inter Greisb. & Fox. Brook tit. exec. c. 49.

[c] L. pro hæred. ff. de acquir. hæred. Mantic. de conject. ult. vo. lib. 12. tit. 9. n. 18.

[d] Mascard. de probac. concl. 44. n. 5. 29. 45. Fitz. Abridg. tit. executor, n. 38. * Aditio hæreditatis quomodo probatur copiose Masca. Tract. de probac. qui per multas conclusiones hanc materiam prosequitur in verb. aditio.

Insomuch that if a stranger (one I mean who is neither Executor nor Administrator) shall assume upon him the office of an Executor or Administrator, by using the goods of the deceased, or by taking them into his possession; this is a sufficient administration to charge him as Executor of his own wrong, whereby they to whom the Testator was indebted may recover their debts against him; so that there be no other Executor or Administrator, who hath proved the Will or administred the goods of the deceased, against whom the Creditors may have action for the recovery of their debts *. But when the Will is proved, or Administration granted, and they intermeddled; in this case, albeit a stranger take the deceased's goods into his own hands, challenging them for his own, and do use and dispose them as his own, yet this doth not make him Executor of his own wrong by construction of Law: because there is another Executor of right, whom the Creditor may charge, and against whom he may bring his action †. And those goods which the right Executor taketh forth of the other's possession, after he hath administred, are assets in his hands ‖. And yet for all this, albeit there be an Executor which doth administer, yet if the stranger take those goods, and, claiming to be Executor, pay debts and receive debts, or pay legacies, and intermeddle as Executor; there, because of such express administring as Executor, he may be charged

* Do. Coke lib. 5. relationum, fol. 33, 34. in Reades case.

† Remedium ordinarium facit cessare extraordinarium, nec concurrit auxilium ordinarium cum auxilio in subsidium introducto. L. In caus. el. 2. de minor. ff.

‖ Do. Coke ubi supra.

charged as Executor of his own wrong, although there be another Executor of right *: as in the former caſe, where he doth take the goods of the deceaſed, before the right Executor have taken upon him the Executorſhip, or proved the Will; in which caſe he is chargeable as Executor of his own wrong, whereas the right Executor ſhall not be charged but with thoſe goods which come to his hands after he hath aſſumed upon him the charge of executing the Teſtator's laſt Will †. And here alſo it is to be noted, that a man ſhall be charged as Executor of his own wrong, which taketh into his hands any of the goods of the deceaſed, although the Teſtator were indebted unto him, and he onely intending to ſatisfy his own debt, doth take and retain ſo much of the deceaſed's goods as doth countervail his debt, and no more ‖: for he may not be his own carver in this caſe *, becauſe of the great inconvenience and confuſion which otherwiſe would inſue; for then, whenſoever any died indebted more then his goods would extend to diſcharge, every of the Creditors would ſtrive to ſatisfy himſelf firſt, and by force or tart means bar the reſt from their right, contrary to right †.

But if a man doe thoſe acts which are not proper to an Executor, he is not ſaid to have adminiſtred as Executor to the effect aforeſaid [f]: as, to feed the cattell of the deceaſed, leſt they ſhould periſh [g]; or to take into his cuſtody the goods of the deceaſed, to the end they may be ſafe from being ſtoln or purloined [h]; or to diſpoſe of the Teſtator's goods about the funerals [i]: for theſe be deeds of charity common to every Chriſtian, and not peculiar to an Executor [k]. Likewiſe to make an Inventory of the goods of the deceaſed, is not to adminiſter as Executor [l]; or to deliver to the wife her convenient apparell [m]; or to take the Teſtator's horſe and ride him, or to uſe him as his own, ſuppoſing him not to be the Teſtator's, but his own [n]; or to take of the goods of the Teſtator by the lawfull and unfraudulent gift of the Teſtator [o]. And generally, whoſoever as a meer treſpaſſer entreth into the goods of the Teſtator, whether it be to things living, as horſe, kine, ſheep, or dead things, as pots, pans, diſhes, converting the ſame to his own proper uſe, and not to the uſe of the Teſtator, as to the payment of the Teſtator's debts or legacies, doth not adminiſter as Executor [p].

* Ibidem. unde ſibi imputet, quia os ſuum contra ſe aperuit. Nam expreſſa nocent, quæ tacita non nocent. L. de reg. jur. ff.

† Do. Coke ubi ſup.

‖ Do. Coke lib. 5. relationum, fol. 30. in Coulr. caſe.

* Nemini licet ſibi jus dicere. L. uni. C. Nequis in cauſ. ſan.

† Nemo ex dolo ſuo debet reportare commodum. L. 1. ff. Imo fraudibus & doliis omnibus modis occurr. C. ſedes. de refer. ex.

[f] Mantic. de conject. ult. vol. lib. 12. tit. 9. n. 18.

[g] d. L. pro hær. Fitzherb. tit. exec. n. 45.

[h] d. L. pro hærede.

[i] Ead. L. pro hær. & ibi DD. Lind. in d. c. ſtatutum. Fitz. tit. exec. n. 38. Brook tit adminiſtr. n. 6. 28.

[k] L. non hoc. C. unde legit. d. L. pro hær. Fitz. tit. exec. n. 38.

[l] Mant. de conject. ult. vol. li. 12. tit. 9. n. 15. Jaſ. & Alex. in L. ult. § ſin autem. C. de jure deli. quæ opinio communis eſt, adverſus Bar. & ejus ſequaces, ut refert Maſcard. de probac. concl. 48. ſed cum diſtinctione, ut ibi per eundem. [m] Brook tit. admin. n. 6. Tu autem vide Maſcard. de probac. concl. 44. n. 46. &c. Dyer fol. 166. [n] Brook tit. admin. n. 28. Huc pertinet quod ſcriptum reliquit Maſcard. de probac. concl. 45. n. 46. &c. [o] Brook tit. execut. n. 162. Maſcard. d. concl. 45. n. 29. &c. [p] Brook tit. execut. n. 165. tit. adminiſt. n. 42.

Which former concluſions are generally true, whenas another is named Executor, and as Executor hath intermeddled with the goods of the deceaſed; for then he which didwithout authority take the goods of the deceaſed into his own poſſeſſion, or diſpoſeth thereof to his own private uſe, ſhall not be ſubject to be ſued as Executor of his own wrong by the Creditors of the deceaſed, ſeeing they have action againſt the right Executor, and he again hath action againſt the occupiers of the ſaid goods without authority, as is afore ſaid ‖. What if the

‖ Supr. eod. § n. 62. cum ſequen.

the Executor named in the Teſtament prove the ſame? whether is he thereby tied to ſatisfy the Creditors of the deceaſed, as one that hath adminiſtred? It ſeemeth that he is not *, unleſs alſo he pay the fees due out of the goods of the deceaſed. What if the Executor named in the Teſtament do take the goods to him deviſed by the Will? whether is he hereby adjudged to have adminiſtred as Executor, and conſequently tied to anſwer the Creditors as Executor? It ſeemeth that he is †, unleſs they had been delivered unto him by another; in which caſe it ſeemeth that he hath not adminiſtred to the effect aforeſaid.

* Labridg. dez caſes edit. An. Dom. 1597. fol. 175. ubi rationem reddit, quia probatio teſtamenti eſt opus ſpirituale, ſine adminiſtratione.

† d. Labridg. dez caſes, Sect. 19. n. 1. fol. 182.

Howbeit, in theſe caſes and ſuch like, whoſoever feareth to be adjudged Executor adminiſtring of his own wrong, the moſt ſafe courſe is not to meddle at all, but utterly to abſtain from all manner of uſe of the Teſtator's goods; and namely, let him beware that he do not ſell any goods, or kill any cattell of the deceaſed q.

q Brook tit. admin. n. 26. Quamvis jure civili certo certius eſt, eum qui res perituras, quæ videlicet ſervando ſervari non poſſunt, diſtraxit, in ea cauſa eſſe, ut pro hærede non geſſerit, quia hoc non adeundi animo factum eſſe præſumitur. d. L. pro hærede.

By

By what means

TESTAMENTS OR LAST WILLS become void.

The Seventh Part.

§ I.

1. *Teſtaments loſe their force two waies.*
2. *By what means Teſtaments are void from the beginning.*
3. *By what means the Teſtament, once good, is made void afterwards.*
4. *How we may know when the Teſtament is void from the beginning.*

HItherto of thoſe things which appertain to the *making* and *accompliſhing* of Teſtaments: now of ſuch things as tend to the *diſſolution* thereof.

Albeit (1) the means whereby Teſtaments and laſt Wills do loſe their force be many [a]: yet they may be reduced to two [b].

The firſt is, when (2) there is ſome Original defect or corruption in the Teſtament [c]; which may happen divers waies: either becauſe the Teſtator is ſuch a perſon as cannot make a Teſtament or laſt Will [d]; or becauſe the things bequeathed are not deviſable by Will [*]; or becauſe the manner of the diſpoſition is unlawfull [f]; or for that the perſon named Executor is incapable thereof; or for ſome other cauſe hereafter

[a] De quibus Vigel. in ſua method. jur. civil. l. 9. c. 5. cum ſeq.
[b] Vigel. in tit. quib. mod. teſt. infir. Inſtit.
[c] L. ſi quæramus. ff. de teſta.
[d] Supra part. 2.
[*] Supra part. 3.
[f] Supra part. 5.

hereafter expreſſed [h]. And ſuch a Teſtament or laſt Will being void originally, or from the beginning, is called *nullum*, ſometimes *injuſtum*, or *non jure factum* [i].

The other means is, when (3) the Teſtament or laſt Will, being free from originall fault, doth afterwards become void [k]. And this alſo may happen divers waies: as by the making of a later Teſtament [l]; or by revoking or cancelling of that which is made [m]; or by alteration of the ſtate of the Teſtator [n]; or by forbidding or hindering the Teſtator to make another Teſtament [o]; or if he that is named Executor will not, or doth become unable to be Executor [p]; and by many other means more particularly ſhewed hereafter [q]. And this kind of Teſtament which, once being good, becometh void *ex poſt facto*, is ſometimes called *ruptum*, ſometimes *irritum* [r].

[h] Infra § prox. cum §§ ſeq. uſque ad § 14.
[i] d Minſing. & Vigl. in in. tit. quib. mod. teſt. [k] fir. Inſtit. bu Vigl. in d. tit. qui- [l] s mod. teſta. infir. L. § poſteriore. Inſt. quib. mod. teſta. infir. & infr. § 14.
[m] L. 1. de his quæ teſta. del. ff. & inf. §§ 15, 16.
[n] § alio. Inſt. quibus mod. teſta. infir. & infra § 17.
[o] Tit. ſi quis aliquem teſtari prohib. ff. & § 20. cum reliquis §§ uſque ad finem. [p] L. 1. ff. de injuſt. rupt. & irrit. teſtam. & infr. § 19. [q] Infr. C. & infra § 18. [r] Tit. de injuſt. rup. & irrit. teſtam. ff. d. § alio. Inſt. quib. mod.

Touching the former of theſe void Teſtaments, foraſmuch as we have already declared who may make a Teſtament, what thing may be diſpoſed, what form is lawfull, and who may be Executor or Legatary; and on the contrary, what perſon cannot make a Teſtament, what thing cannot be deviſed, what form is not lawfull, and what perſon is not capable of an Executorſhip or Legacy; it is a matter of little labour, and leſs difficulty, by examination of the premiſſes, to collect and diſcern (4) when the Teſtament is originally void, either in reſpect of the Teſtator, or of the thing bequeathed, or of the form of the diſpoſition, or of the perſon of the Executor or Legatary. Whereunto it may be added, that the Teſtament is originally void, or at the leaſt voidable by exception, when the Teſtator is compelled by fear [†], or circumvented by fraud [t], or overcome by immoderate flattery [v], to make the ſame. It is alſo void from the beginning, ſometimes by reaſon of error [x], ſometimes by reaſon of uncertainty [y], and ſometimes by reaſon of imperfection [z], and ſometimes becauſe the Teſtator hath not *animum teſtandi* [a], a meaning to make his Teſtament or laſt Will.

† Infra § prox.
[t] Infra § 3.
[v] Infra § 4.
[x] Infra § 5.
[y] Infra § 6. cum ſeq.
[z] Infra § 12.
[a] Infra § 13.

Touching the other kind of theſe Teſtaments, ſuch, I mean, as were good at the firſt, but do become void afterwards, we ſhall ſpeak more particularly hereafter.

§ II. Of

§ II. Of the Testament made by Fear.

1. *Exception of Fear destroyeth the Testament.*
2. *Whether this exception be prejudiciall to any other then to the Authour thereof.*
3. *What if the Testament be confirmed with an oath?*
4. *What if the force be not of present hurt?*
5. *What if the Testament be made after the time of the violence offered, and not at that instant?*
6. *Whether the Testament made by fear be void* ipso jure.
7. *Vain fear hindereth not the validity of the Testament.*
8. *The Testament confirmed after fear past is good.*
9. *The Testament is good, saving in favour of the Authour of this fear and his complices.*
10. *What if the Testator protest that he made his Testament being compelled by fear? whether doth this protestation make void the Testament?*

NOthing is more contrary to free consent then Fear [a]. Worthily (1) therefore is that Testament to be repelled which is made upon just fear [b]. Which conclusion is diversly both extended and limited.

[a] Nihil consensui. de reg. jur. ff.

[b] Bar. in L. fin. si quis aliquem testari prohib. ff. Jas. & Sich. in Rub. si quis aliquem. C. quamvis communi Doctorum opinione, hujusmodi testament. non sit ipso jure nullum, ut per Grass. Thesaur. com. op. § test. q. 23. Soarez. l. rec. senten. verb. testam. n. 56, 57.

The first Extension is, that the Testament made by fear is uneffectuall, not (2) onely in respect of that person who put the Testator in fear, but in respect of other persons also [c]; albeit ignorant of that fear wherewith the Testator was constrained in their behalf [d].

[c] Glo. in Rub. si quis aliqu. prohib. ff. Bar. in d. L. fin. Boss. tract. var. tit. de his qui prohib. aliquem testari, n. 4.

[d] Bar. & Boss. ubi supr. Contrar. tamen opinionem tenent Jas. & Sichar. in Rub. si quis aliquem. C. Sed distingue, ut infra in limitac. 4.

Secondly, the (3) Testament is overthrown by the exception of fear, albeit the Testator did with an Oath confirm the same during the fear *. For where a man being overcome with fear, to the end he may escape that danger, doth swear with his mouth to perform that thing which he intendeth not with his heart; this Oath doth not give any strength to that act [f]: but contrariwise, the act is so much the weaker, by how much the suspicion of fear by this extorted Oath is made the stronger.

* Quamvis de pactis. l. 6.

[f] DD. in d. c. quamvis. Felin. in c. si vero. de jurejur. extra. n. 8. declar. 4.

Thirdly, (4) not onely that Testament is deprived of lawfull force which the Testator is constrained to make by present force and violence, but that also where the Testator is but onely threatned with future evils, being such as may move just fear [g]. Although by the Civill Law in other respects, that is to say, of greater or lesser punish-

[g] Sichar. in d. Rub. si quis aliquem. C. n. 1. Jas. in § quadrup. instit. de action. ubi tradit quinque genera metus.

ment of the authour of this fear, there is great difference, whether he exerciſe violence againſt the Teſtator, or threatnings onely; as alſo whether the violence be open or ſecret [h]: of which puniſhment we have no great uſe in *England*, except it be for forgery of Wills [i].

Fourthly, albeit (5) the Teſtament were not made at the time of the violence or threatnings executed, but afterwards; yet the cauſe of the fear ſtill enduring, it is of no more force then if it had been made at the time of the former beating or threatnings [k].

The Limitations of this former concluſion are theſe. Firſt, the Teſtament (6) made by fear is not void *ipſo jure*, but voidable by the help of exception [l]. The reaſon is, becauſe he that doeth an act through fear, doth after a ſort conſent [m], that is to ſay, of two evils he chuſeth the leſs [n], and is willing rather to make a Teſtament, then to incur the perill threatned [o]. And albeit ſome be of this opinion, that the Teſtament made by fear is void *ipſo jure*; and that in this caſe a conſtrained Will is no Will, being rather *noluntas*, then *voluntas* [p]: yet the common opinion is againſt them [q], unleſs the coaction be not conditionall, but preciſe, neceſſary, and inevitable [r].

[h] Sichar. in d. Rub. Jul. Clar. § falſum. & pract. criminal. q. 3.
[i] Stat. Eliz. 2. an. 5. c. 14.
[k] Zaſ. in L. ſi ob turpe. ff. de cond. indeb. Peck. tract. de teſta. conjug. l. 1. tit. 9. n. 3.
[l] Bar. in L. fin. ſi quis aliq. teſtari prohib. ff. Arc. in L. 1. ff. de teſt.
[m] L. ſi mulier. § pen. ff. quod met. cauſa.
[n] Weſenb. in tit. quod met. cauſa. ff.
[o] Weſenb. ibid.
[p] Vaſq. de ſucceſ. crea. § 17. requiſit. 22. Jaſ. in Rub. ſi quis aliquem teſt. prohib. C.
[q] Vaſq. d. § 17. n. 5. Graſſ. Theſaur. com. op. § teſt. q. 83. Soarez. eod. l. verb. teſt. n. 56, 57. Mantic. de conject. ult. vol. l. 1. tit. 3. l. 2. tit. 7.
[r] Quia tunc omnino deeſt voluntas. Weſen. in tit. quod met. cauſa.

The ſecond Limitation is, when (7) the fear is but a vain fear †: (for a juſt fear onely, that is, ſuch a fear as may move a conſtant man or woman, maketh void the Teſtament [t]; as the fear of death, or of bodily hurt, or of impriſonment, or of the loſs of all or moſt part of one's goods, and ſuch like fear:) whereof no certain rule can be delivered, but it is left to the diſcretion of the Judge, who ought not onely to conſider the quality of the threatnings, but alſo the perſons, as well threatned, as threatning; and in the threatned, the ſex, the age, the courage, or puſillanimity; and in the perſon threatning, the power, the diſpoſition, and whether he be a meer boaſter, or performer of his threats [v].

† L. ſi quis ab al. off. de re. itid. L. vani, de reg. jur. ff.
[t] c. ad audientiam. c. cum dilectus. de his quæ metum extra. Mantic. de conject. ult. vol. lib. 2. tit. 7. n. 6.
[v] Menoch. de Arb. Jud. caſ. 135. Maſcar. tract. de prob. conc. 1054. Idem Menoch. tract. de præſump. l. 3. præſ. 126.

Thirdly, if the (8) Teſtator afterward, when there is no cauſe of fear, do ratify and confirm the Teſtament, I ſuppoſe the Teſtament to be good in Law [x].

[x] L. 2. C. de his quæ vi, &c. L. ſi ob turpem. ff. de cond. indeb. Sichar. in L. ſi per vim. C. de his quæ vi, &c. n. 3.

Fourthly, where (9) it is ſaid that the Teſtament is uneffectuall, as well in reſpect of the authour of the fear, as of others for whom he extorteth any benefit in the Teſtament: yet if the Teſtator of his own accord do in the ſame Teſtament bequeath any Legacy to any other perſons beſides theſe afore named, the Teſtament in that reſpect is not unlawfull [y].

[y] Bar. in d. L. fin. § ſi quis aliq. ff. Bal. in L. 1. eod. tit. C. n. 7.

Fifthly, if the (10) Teſtator, after the making of the Teſtament, do affirm or proteſt generally, that the Teſtament by him made was done through fear, not expreſſing particularly by whom he was compelled thereunto; ſuch bare proteſtation doth not make void the Teſtament [z]: but if the Teſtator doth expreſs by whom he was conſtrained, proteſting that he would gladly alter the Teſtament, but for fear of the perſons by him named; by ſuch aſſertion the Teſtament is void, at the leaſt in the prejudice of thoſe perſons [a].

[z] Bald. in d. L. 1. Mantic. de conject. ult. vol. l. 2. tit. 7. n. 5.
[a] Mantic. ubi ſupra. Sichar. in Rub. ſi quis aliquem teſtari prohib. c. n. 5.

§ III. Of

§ III. Of Teſtaments made by Fraud.

1. *Fraud as deteſtable as Force.*
2. *Whether all manner of Deceit be evill.*
3. *What if the Deceit be very ſmall.*

FRaud (1) is no leſs deteſtable in Law then open force [a]. Wherefore when the Teſtator is circumvented by fraud, the Teſtament is of no more force then if he were conſtrained by fear [b].

[a] Olden. de Action. claſſ. 5. fo. 518. in action. ex teſtam.

[b] L. non enim. de inoffic. teſta. L. 1. de excep. dol. ff.

Nevertheleſs (2) when the Deceit is not evill, but good, (for all deceit is not evill [c],) ſuch deceit doth not hinder the Teſtament [d]. For example; the Teſtator intending to beſtow all his goods upon ſome vile and naughty perſon, omitting his honeſt wife and dutifull children; if the wife or children beguile the Teſtator, perſwading him that that lewd perſon is dead; or by ſome other means deceive the Teſtator, and ſo procure themſelves to be made Executors, or univerſall Legataries: this deceit is not reproved as evill, and therefore the Teſtament is not to be repelled as unlawfull *.

[c] Zaſ. in tit. de dolo malo. ff.

[d] Bald. in L. ſi quis aliquem teſtari prohib. C. & Sich. in Rub. ibid.

* Bald. in d. L. 1. n. 17.

It ſeemeth (3) alſo that the Teſtament is not void, when the deceit is very light and ſmall, ſuch as cannot beguile a prudent man or woman [f]. For as that fear onely is termed juſt, and is able to overthrow the Teſtament, which may overcome a conſtant man: ſo that deceit onely ſeemeth ſufficient to repell the approbation of a Teſtament, which may deceive a prudent perſon [g]. Howbeit, (if this limitation be true,) yet as in that caſe it is left to the diſcretion of the Judge, to determine what fear is juſt, reſpecting the quality of the threats, together with the diſpoſition of the parties; ſo in this caſe, the Judge comparing the deceit with the capacity or underſtanding of the perſon deceived, may beſt diſcern whether it be ſuch a deceit as may overthrow the Teſtament or not [h].

[f] C. cum dilectus. de his quæ vi vel metus cauſa extra.

[g] Panor. in d. c. cum dilectus. n. 4. Marſil. ſing. 207. Alex. in apoſtil. ad lect. Bar. in L. eleganter. ff. de dolo, in prin. d. L.

[h] Arg. d. c. dilect.

How the Teſtator may be induced by fraud to make or revoke his Teſtament, were it not that the crafty would put the ſame in practice, is a thing not altogether unworthy the underſtanding. But leſt by inſtructing the better to avoid the ſame, I might alſo teach the evil-affected to follow the ſame; ſufficeth it to refer the Reader to that which hath been ſpoken of captious Wills [i], and to that which hereafter ſhall be uttered of forbidding or hindring the Teſtator to make or alter his Will [k].

[i] Supr. part. 4. § 11.

[k] Infra § 10.

§ IV. Of Testaments made by Flattery.

1. *Flattering persuasions not always unlawfull.*
2. *What if fear go before?*
3. *What if fraud be intermingled with flattery?*
4. *What if the Testator be of weak judgement, and the Legacy great?*
5. *What if the Testator be under the government of the flatterer?*
6. *What if the flatteries be immoderate?*
7. *What if the Testator have made a former Testament?*

IT is not (1) unlawfull for a man by honest intercessions, and modest perswasions, to procure either another person or himself to be made Executor [a]: neither is it altogether unlawfull for a man, even with fair and flattering speeches, to move the Testator to make him his Executor, or to give him his goods [b], except in these cases following.

The first case is, when (2) he that is made Executor did first beat or threaten the Testator, and thereby did put him in fear: for then it is justly suspected and presumed, that the Testator is moved to make his Testament rather by fear then by fair speeches [c].

The second case is, (3) when unto flattery is joyned fraud or deceit [d].

The third case is, (4) when the Testator is a person of weak judgement, and easy to be perswaded, and the Legacy great *.

The fourth (5) case like unto this is, when the Testator is under the government of the perswader, or in his danger [f]. And therefore if the Physician during the time of sickness be instant with the Testator to make him his Executor, or to give him his goods, this Testament is not good [g]; for the Law presumeth, that the Testator did it lest the Physician should forsake him, or negligently cure him [h]. So it is if the Testator being sick, his wife neglect to help him, or to provide remedy for the recovery of his health, and nevertheless in the mean time busily apply him with sweet and flattering speeches, to make her his Executrix, or to bestow his goods upon her: for in this case the disposition is uneffectuall [i].

The fifth case is, (6) when the perswader is very importunate [k]: for an importunate beggar is compared to an Extortor [l]; and it is an impudent part still to gape and cry upon the Testator, and not to be content with the first or second deniall [m].

The sixth case is, (7) when the Testator hath made another Testament before; for then the latter Testament, made at the instigation or request of another person, is not good in prejudice of the former [n], as elsewhere is and shall be declared [o].

[a] Olden. de action. class. 5. fol. 518. in action. extestamento.
[b] L. ult. si quis aliquem testari prohib. ff. & C. ac DD. ibidem.
[c] Peck. de test. conjug. l. 1. c. 9. n. 23. Jas. & Sich. in L. ult. C. si quis aliquem testari prohib. Menoch. de arb. Jud. c. 395. n. 41. verb. hoc fortius.
[d] Sich. in d. L. ult. n. 13. Olden. de action. class. 5. f. 518. Menoch. d. cas. 395. n. 41. Aflict. decis. 69.
* Molin. in Apostil. ad Dec. consil. 489.
[f] Molin. in Apostil.
[g] Peck. de testam. conjug. l. 1. c. 9. n. 6. Bar. in L. Archiatr. de profes. & med. l. 10. C.
[h] Peckius ubi supra. & in c. 17. eod. L. Lucas de Penna in d. L. Archiatr. juxta illud Poetæ,
Garrulus ægroto medicus si forte medetur,
Alter adest morbus continuusque dolor.
[i] Peckius lib. 1. de testa. conjug. c. 9. n. 5. Math. de Afflict. decis. 69.
[k] C. fin. 20. q. 3. Abb. in c. præterea. de offic. deleg. extr. Menoch. de Arbit. Jud. cas. 395. n. 41. & latius Peckius d. c. 9. n. 9.
[l] Imol. in c. petitio de jure. Peckius in d. c. 9. n. 9. L. 1. § persuadere. ff. de ser. cor.
[m] Peckius ubi supr. Rebuff. Tract. de reseript. 2. gloss. 3.
[n] Socin. Jun. consil. 14. vol. 2. Peckius in d. c. 9. versic. tertio.
[o] Supra part. 2. § 27. infra § 14. limitac. 4.

§ V. Of

§ V. Of Error.

1. *Error may happen in divers reſpects.*
2. *Of error in the perſon of the Executor or Legatary.*
3. *Of error in the name of the Executor or Legatary.*
4. *Of error in the quality of the Executor or Legatary.*
5. *Whether a falſe cauſe makes void the diſpoſition.*
6. *Error in the thing bequeathed, manifold.*
7. *Of error in the proper name of the thing bequeathed.*
8. *Of error in the name appellative of the thing bequeathed.*
9. *Of the difference betwixt a proper name, and a name appellative.*
10. *An objection, with the anſwer.*
11. *Certain caſes wherein error in the name appellative is not hurtfull.*
12. *Error in the ſubſtance of the legacy doth deſtroy the legacy.*
13. *Error in the quantity of the thing bequeathed is not hurtfull.*
14. *Certain caſes wherein error in quantity doth deſtroy the legacy.*
15. *Certain caſes wherein error in the quantity of the thing bequeathed as a certain body is not hurtfull.*
16. *Error in the quality of the thing bequeathed doth not deſtroy the legacy.*
17. *Error in the form of the diſpoſition doth deſtroy the force thereof.*

ERror doth ſometimes overthrow the diſpoſition of the Teſtator, ſometimes not. Therefore that we may underſtand whether this error hurt or not, we are to conſider, (1) whether the error doth reſpect the Executor or Legatary, or the Thing bequeathed, or the Form of the diſpoſition. And if it do reſpect the Executor or Legatary, then whether the Teſtator do erre in the Perſon, or in the Name, or in the Quality of the Executor or Legatary.

When (2) the Teſtator doth erre in the Perſon of the Executor or Legatary, ſuppoſing him whom he maketh Executor, or to whom he doth bequeath any Legacy, to be another perſon then he is, the diſpoſition is void [a]. For example, the Teſtator intending to make *John at Stile* his Executor, or to give to *John at Stile* an hundred pound, he ſaith, I make *John at Noke* my Executor, or, I give to *John at Noke* an hundred pound. In this caſe neither can *John at Stile* nor *John at Noke* be Executors, or obtain the Legacy [b]. The reaſon is this: *John at Noke* is excluded, becauſe the Teſtator never thought it; *John at Stile* is excluded, becauſe the Teſtator never ſpoke it: for meaning without ſpeaking is nothing, and ſpeech without meaning is leſs [c].

When (3) the Teſtator doth erre in the Name of the Executor or Legatary, and not in the perſon, ſuch error doth not hurt [d], but in certain caſes. One is, when the Teſtator is blind; for then it is ſuſpected

[a] L. quoties. ff. hæred. inſtit.

[b] DD. in d. L. quoties.

[c] d. L. quoties. & L. in ambiguo. ff de reb. dub.

[d] L. ſi in nomine. C. de teſta.

ted that the Teſtator doth miſtake the perſon, together with the name *. Another is, when the Teſtator doth erre in the name of his own ſon f, or of his father g. The reaſon is, for that this groſs error doth note the Teſtator of folly h: but a fool, or he that is not of ſound memory, cannot make a Teſtament i. Much more is the diſpoſition void, if the Teſtator do erre in his own name k: as if the Teſtator ſay, I *Peter* make my Teſtament, where his name is *John*: for this is a plain and evident proof of his folly, or lack of ſufficient memory l.

* Jaſ. & Sichard. in d. L. ſi in nomine. Ripa in L. ſi quis in fund. ff. de leg. 1. n. 9. quem vide.

f Sichar. in d. L. ſi in nomine. n. 14. Ripa in L. ſi quis fund. ff. de leg. 1. ubi ſublimitat hanc limitac. quando viz. natus & educatus eſſet filius in loco remoto. g Ripa in d. L. ſi quamvis. n. 8. h Sichard. & alii in d. L. ſi in nomine. i Supra 2. part. § 4. k Jaſ. in d. L. ſi in nomine. l Bar. in L. cum in liberis. C. de hæred. inſtit. & eſt communis opinio, ut per Graſſ. Theſaur. com. op. § Inſtit. q. 29. n. 2.

When (4) the Teſtator doth erre in the Quality of the Executor or Legatary, this error is not hurtfull m, unleſs that quality were the final cauſe wherefore the Teſtator made him Executor or Legatary: for the error in ſuch a quality doth make void the diſpoſition n. For example; the Teſtator ſaith, I make my coſin *John at Stile* my Executor, or, I give to my coſin *John at Stile* an hundred pound: in this caſe, if *John at Stile* be not coſin to the Teſtator, he cannot obtain the Executorſhip, or Legacy o. Hereunto it may be added, that if the Teſtator do erroneouſly expreſs a falſe cauſe, the diſpoſition is void p. For example; the Teſtator ſaith, Becauſe thou didſt lend me an hundred pound, I bequeath unto thee an hundred pound q; or, Becauſe my ſon is dead, thou ſhalt be my Executor r: In which caſes, the cauſe being falſe, the diſpoſition is of no force. And although it be written, that a falſe demonſtration or falſe cauſe doth not hurt the diſpoſition †: yet that is to be underſtood, where the Teſtator doth not ignorantly, but wittingly t expreſſe the ſame.

m L. falſa demonſtratio. ff. de cond. & demon. c. 1. 29. q. 1. Mantic. de conject. ult. vol. lib. 4. tit. 5. n. 16. Paul. de Caſtro in L. quoties. ff. de hæred. inſtit.

n L. neque profeſſio. C. de teſta.

o d. L. neque. & ibi DD. & Graſſ. Theſau. com. op. § Inſtit. q. 29. n. 4. ubi refert hanc op. eſſe receptam ab omnibus, niſi fortaſſe teſtator ſolet appellare illum conſanguineum ſuum.

p Bar. in L. demonſtratio. § quod autem. ff. de cond. & demon. n. 13. q Bar. ubi ſupra. verb. quædam cauſa proxima. r L. ſui. ff. de hæred. inſtit. Sichard. in Rub. de hæred. inſtit. C. n. 3. † L. cum tale. § falſam. de cond. & demon. ff. § longe. Inſtit. de lega. t Gloſſ. in L. 1. C. de falſa cauſa adject. & ibi Doctores.

But (5) when the Teſtator doth ignorantly expreſs a cauſe, which is ſo annexed unto the Legacy v, as without the which cauſe he would not have given that Legacy x: in this caſe, the cauſe being falſe, the legacy is void y.

v Bar. in d. L. demonſtratio. § quod autem. de cond. & demon. ff. n. 13. & Paul. de Caſtr. in d. L. n. 5. x Secus ſi cauſa ſit impulſiva tantum, quæ ab ignorante adjicitur: nam illa, quantumcunque falſa, non viciat diſpoſitionem, niſi forte non cauſative, ſed conditionaliter ſit adjecta; quia tunc viciatur diſpoſitio, ſive intellexerit, ſive ignoraverit teſtator cauſam illam non exiſtere. Sichard. in Rub. Paul. de Caſtr. in d. L. demonſtratio. Minſing. & alii in d. § longe. Inſtit. de lega. Vigel. Method. jur. civil. lib. 12. c. 10. ex ep. 71. y Porcius in § longe. inſtit. de lega. & ibi Minſing. n. 2. Sich. in Rub. de hæred. inſtit. C. & Paul. in d. L. demonſtratio.

If the (6) error touch the Thing bequeathed, then we are to enquire whether the Teſtator do erre in the Name, or in the Subſtance, or in the Quality, or in the Quantity of the thing bequeathed.

The (7) error of the Teſtator in the proper Name of the thing bequeathed doth not hurt the validity of the Legacy, ſo that the body or

ſubſtance

ſubſtance of the thing bequeathed be certain [z]. For example; the Teſtator doth bequeath his horſe *Bucephal*, whereas the name of his horſe is *Arundel:* this error is not hurtfull, but that the Legatary may obtain the horſe *Arundel*, if the Teſtator's meaning be certain [a]. For names were deviſed to diſcern things [b]. If therefore we have the thing, it skilleth not for the name [c].

[z] § ſi quidem in nomine. Inſtit. de lega. quæ ſententia communis eſt. Graſſ. Theſaur. com. op. § Legatum. q. 65.

[a] Bar. Zaſ. & alii in L. ſi quis in fund. ff. de leg. 1. [b] L. Labeo. ff. de ſup. leg. [c] d. § ſi quidem in nomine. Inſtit. de lega.

The (8) error in the Name appellative of the thing bequeathed doth deſtroy the Legacy [d]. For example; the Teſtator intending to bequeath an horſe, doth bequeath an oxe; or meaning to bequeath gold, doth bequeath apparell: in both theſe caſes the Legacy is void *. The reaſon of the difference (I mean, of the divers effects betwixt the error in proper names and the error in names appellative) is, becauſe (9) a proper name is an accident attributed to ſome ſingular or individuall thing, to diſtinguiſh the ſame from other ſingular things of the ſame kind: whereas names appellative do reſpect the ſubſtance of things, and being common to every ſingular of the ſame kind, make them to differ from things of other kind or ſubſtance [f]. Againſt (10) this reaſon it is commonly objected, that words or names are but invented to ſignify things [g]; and that the words of the Teſtator are to be drawn even into an improper ſenſe to maintain the Will and diſpoſition of the Teſtator [h]. To the which objection it is anſwered, that theſe words which have a manifold ſenſe may be ſtretched to that ſenſe which is contained therein, albeit improperly; but to comprehend that ſenſe which is not at all within compaſs of the words, neither properly nor improperly, they may not be ſtretched ſo far [i]: for then this concluſion hath place, *That which I would, I ſpake not; that which I ſpake, I would not:* and ſo neither is good [k].

[d] Si quis in fund. ff. de leg. 1.

* d. L. ſi quis in fund.

[f] Minſing. in d. § ſi quidem in nomine. n. 8. DD. in d. L. ſi quis. & in L. ſi in nomine. C. de teſtam.

[g] Text. in d. § ſi quidem in nomine.

[h] L. non aliter. de leg. 3. ff. Mantic. de conject. ult. vol. lib. 3. tit. 5. n. 2.

[i] Ripa & Zaſ. in L. ſi quis in fund. ff. de leg. 1. ille, n. 26. iſte, n. 20.

[k] L. in ambiguo. de reb. dub. ff.

Nevertheleſs, (11) it is not perpetually true, that the error in the name appellative of the thing bequeathed doth make void the diſpoſition: for if the thing bequeathed be preſent, and the Teſtator doth with his hand demonſtrate the ſame, albeit he do erre in the name appellative, it doth nothing hinder the validity of the Legacy [l]. Likewiſe if there be ſome conformity or ſimilitude betwixt the name appellative, and the name wherein the Teſtator doth erre, the Legacy is not void: as if the Teſtator, meaning to bequeath his books, doth bequeath his papers [m]. Or if the Teſtator proteſt, that the Legacy ſhall paſs by thoſe terms: for then the error in the name appellative is not hurtful [n]. Or if by common uſe of ſpeech the name appellative be altered: for then it is in the election of the Teſtator to uſe whether name he will, even that which is leſs proper [o]. Or if the names be artificiall, not natural, as to uſe *Proctorſhip* for *Curatorſhip* [p].

[l] Gloſſ. in L. quæ extrinſecus. ff. de verb. ob. Jaſ. in d. L. ſi quis in fund. qui ibi refert hanc opinionem eſſe veram.

[m] Gloſſ. in d. L. ſi quis in fund. Bar. in L. quæſitum. § ſi mihi. de leg. 1. & eſt com. op. ait Graſſ. Theſ. com. op. § legatum. q. 65.

[n] Gloſſ. in d. L. ſi quis in fund. & quod hæc communis ſit, numerat Ripa in d. L. ſi quis. n. 27. & Graſſ. § legatum. q. 65.

[o] Jaſ. & Zaſ. & Ripa in d. L. ſi quis in fund. [p] Minſing. in § ſi quidem in nomine. Inſtit. de lega. n. 2.

The (12) error in the body or ſubſtance of the thing bequeathed doth deſtroy the Legacy [q], like as in the perſon of the Executor or Legatary [r].

When (13) the error is in the Quantity of the thing bequeathed, it doth not hurt the Legacy [†]. For example; the Teſtator meaning to bequeath the fourth part of his goods, doth by words bequeath the one half; or meaning to give but fifty pound, doth bequeath an hundred pound: or contrariwiſe, the Teſtator meaning to bequeath a great quantity or ſumme, doth expreſs a leſſer rate or ſumme [t]. In theſe caſes the Legacy is good, and the Legatary may obtain ſo much as the Teſtator did mean, be it more or leſs then the portion or ſumme uttered [v].

[q] ſi quis in fund. de leg. 1. ff.
[r] L. quoties. de hæred. inſt. ff.
[†] L. qui quartam. de leg. 1. ff.
[t] Et ſic valet legatum, ſive quantitas ſit continua, ſive diſcreta; vel, ut alii loquuntur, ſive pars ſit quotitativa, ſive numeralis. Jaſ. & Zaſ. in d. L. qui quartam.
[v] Bald. Paul. de Caſtr. Alex. Jaſ. & Zaſ. in d. L. qui quartam. quamvis Bar. contrariam partem teneat, caſu quo minor ſumma ſit expreſſa; cujus opinio communiter reprobatur. Et ſic valet legatum utroque caſu.

Howbeit (14) if the quantity be bequeathed as a certain body; as if the Teſtator bequeath an hundred pound lying in ſuch a cheſt, when as there is no money in the cheſt; in this caſe the Legacy is void [x]. Likewiſe if the Teſtator do generally bequeath unto another whatſoever he himſelf doth owe unto that other, the Teſtator not being indebted; the Legacy is void [y]. So it is, if the Teſtator do ſay, I do bequeath unto ſuch a man ten pound which he oweth me; in this caſe alſo the Legacy is void, if the Legatary be not at all indebted to the Teſtator [z]. So it is, if the Teſtator do bequeath a certain ſumme to one, which either he (the Legatary I mean) or ſome other doth owe unto the Teſtator, when no ſuch ſumme is due by either of them to the Teſtator [a]: for whether the Teſtator did know, or not know, that nothing was due unto him, in both theſe caſes the Legacy is void [b]. So it is, if the Teſtator, ſuppoſing himſelf to be indebted to another, doth bequeath that debt to the perſon to whom he erroneouſly ſuppoſeth himſelf to be indebted, not expreſſing any quantity; for the Legacy is in this caſe void [c]. But if the Teſtator, knowing himſelf not to be indebted, doth ſay, I bequeath to ſuch a perſon ten pound which I do owe unto him; in this caſe the Legacy is good, notwithſtanding the falſe demonſtration [d]: neither is the Teſtator preſumed to erre in this caſe; and therefore unleſs the Executor make proof of the error, the Legatary may recover the Legacy [*].

Where (15) I ſaid a little before, that the Legacy of quantity being bequeathed as a certain body, as when the Teſtator doth bequeath an hundred pound lying in ſuch a cheſt, or which ſuch a perſon doth owe unto him, that then no money being found in the cheſt, or nothing being due by that perſon, the Legacy is void [f]; this concluſion doth admit theſe limitations. One is, when the miſ-report or falſe demonſtration is not joyned to the ſubſtance of the Legacy, (as before [g],) but to the execution thereof: as thus, *viz.* I give to A. B. an hundred pound, and I will that the ſame be payed of the money which I have in ſuch a cheſt, or of the money which ſuch a man doth owe unto me. For albeit

[x] L. ſi ſervus. § ſi quinque. L. ſed & ſi certos nummos. ff. de leg. 1. Minſing. in § huic proxima. Inſtit. de lega. n. 8. Graſſ. § legatum. q. 59. n. 3.
[y] L. ſi ſic. § ſi mihi. ff. de leg. 1.
[z] Minſing. in d. § huic proxima. Inſtit. de lega.
[a] L. ſi ſic. § ſi mihi. & Jaſ. in d. §.
[b] Paul. de caſtr. in d. § ſi mihi. & Minſing. in d. § huic proxima.
[c] d. § ſi mihi.
[d] Ex. d. § ſi mihi. & Minſing. in § huic proxima. Inſtit. de lega. n. 6.
[*] Caſtr. in L. 2. C. de falſa cauſa adject.
[f] L. ſi ſervus. § ſi quinque. L. ſed & ſi certos nummos. ff. de leg. 1.
[g] Hoc ipſo §. plenius ſupr. part. 4. § 17. n. 8, &c.

beit there be not any money in that cheſt, nor any due by that perſon named by the Teſtator; nevertheleſs the whole Legacy is due, and is to be payed of the Teſtator's goods [h]. For the Legacy being once pure and ſimple, and perfect in it ſelf, it is not made conditionall by that which followeth in another ſentence, reſpecting the performance, and not the ſubſtance of the Legacy: for by ſuch demonſtration the Teſtator is preſumed to have had a care onely how the Legacy might be paid the more eaſily, or with leſs diſcommodity to the Executor; not whether it ſhould be payed at all unto the Legatary [i].

[h] L. quidam. de teſtament. ff. de leg. 1.

[i] d. L. quidam. & L. paulo. de leg. 3. Bar. Caſtr. & alii in d. L. quidam.

Another limitation is this, when ſome part of the Legacy conſiſting in quantity is extant, though not all, according to the demonſtration of the Teſtator [k]. For example; the Teſtator doth bequeath ten pound remaining in ſuch a cheſt, at whoſe death five pound onely is found in that cheſt: in this caſe, howſoever this Legacy be as of a certain body, yet five pound is due and recoverable by the Legatary [l]; but no more then five pound. Inſomuch that if at the death of the Teſtator there were ten pound found in that cheſt, whereas at the time of the making of the Teſtament there was no more but five pound in the cheſt; in this caſe five pound onely is due [m]: unleſs the Teſtator at the Will making did think that there had been ten pound in the cheſt, and ſo did adde other five pound thereunto, to make the ſum anſwerable to his opinion; for then the Legatary may recover the whole ten pound, as if the ſame had been all there, as well at the making of the Teſtament, as at the Teſtator's death [n].

[k] L. ſi ſervus. § ſi quinque. ff. de leg. 1.

[l] d. § ſi quinque.

[m] Paul. de Caſtr. in d. § quinque. n. 9.

And here note, that the Teſtator is preſumed to have thought that there had been ten pound in the cheſt, like as it is ſet down in his Teſtament, unleſs the Executor do prove the contrary, *viz.* that the Teſtator did know that there was but five pound in the cheſt when he made his Teſtament [o].

[n] Idem Caſtr. in d. § quinque. n. 9.

[o] Idem Caſtr. in d. §.

Error (16) in the Quality of the thing bequeathed doth not hurt the Legacy, when the body or ſubſtance is certain [p], no more then the error in the proper name: and therefore if the Teſtator bequeath his white horſe, having but a black horſe, the Legacy is good [q].

[p] Angel. in d. L. ſi quis in fund. ff. de leg. 1.

[q] Et eſt com. op. Ripa in d. L. ſi quis in fund. Graſſ. § legat. q. 56.

Error (17) in the Form of the diſpoſition maketh the ſame to be of no force [r]. For example; the Teſtator intending to make an Executor, or to bequeath any Legacy, conditionally, and not otherwiſe, doth by error omit the condition: in this caſe the diſpoſition concerning the Executorſhip or Legacy is void [†]. Howbeit, if the Teſtator do appoint an Executor, or bequeath any Legacy, according to certain conditions afterwards to be written, no conditions being afterwards written, the diſpoſition is good, and as it were ſimply made [t]; unleſs it do appear that the Teſtator did mean, that the diſpoſition ſhould not take place without thoſe conditions following [v], as in the former example [x].

[r] L. quoties hæres. § tantundem. ff. de hær. inſtit.

[†] d. § tantundem. & DD. ibidem.

[t] L. pen. C. de Inſtit. & ſub.

[v] Molin. in apoſtil. ad Dec. in d. L. pen.

[x] d. § tantundem.

§ VI. Of Uncertainty.

1. *Divers are the means whereby Uncertainty doth grow.*

THAT we may the better underſtand when the uncertainty is ſuch as it doth overthrow the diſpoſition, (for ſometimes it doth deſtroy the ſame, and ſometimes not,) we are to be advertiſed, (1) that the uncertainty doth ſometimes reſpect the Perſon of the Executor or Legatary [a]; ſometimes it doth reſpect the Thing bequeathed [b]; and ſometimes it doth reſpect the Time or Date of the Teſtament [c].

[a] Infra §§ 7, 8.
[b] Infra § 10.
[c] Infra § 11.

The Teſtament is uncertain in reſpect of the Perſon of the Executor or Legatary by divers means, but eſpecially by theſe means following.

Firſt, when it cannot be underſtood whom the Teſtator meaneth, either for that there is no perſon certainly named; or elſe, ſome being named, yet no perſon of that name to be found [d].

[d] Infra § prox.

Secondly, when there be divers perſons of one and the ſame name, whereby the Teſtator maketh his Executor or doth bequeath any Legacy [*].

[*] Infra § 8.

Thirdly, when the Teſtator doth appoint Executors or give Legacies alternatively, or disjunctively, as, I make A. or B. my Executor [f].

[f] Infra § 9.

Of the other uncertainties, *viz.* in reſpect of the Thing bequeathed, or Date of the Teſtament, it followeth afterwards [g]. In the mean time therefore of the uncertainty concerning the Perſon of the Executor or Legatary.

[g] Infra §§ 10, 11.

§ VII. Of Uncertainty, either becauſe no certain perſon is named; or, ſome being named, none of that name is to be found.

1. *The uncertainty of the Perſon maketh void the diſpoſition.*
2. *If the perſon, at the firſt uncertain, be afterwards made certain, whether is the diſpoſition good or no?*
3. *What if ſome perſon be named, but no perſon found of that name?*

WHere (1) no certain perſon is named Executor or Legatary, the Will in that point is void [a]: and therefore if the Teſtator ſay, I make one man of the world my Executor, or, I give to one of the world an hundred pound, no man can be Executor, nor recover the hundred pound by this diſpoſition [b]; unleſs he be able to prove, that the Te-

[a] Bar. in L. quidam. ff. de reb. dub. Clar. § teſt. q. 36. Graſ. Theſ. com. op. § Legatum. q. 64.

[b] Ætiologia eſt, quia iſta perſona eſt incerta ex incertis. Bar. Graſſ. & Clar. ubi ſupra; Arc. in § ex incertis. Inſtit. de lega. & Mant. de conject. ult. vol. lib. 8. tit. 4.

ſtator's

ſtator's meaning was that he ſhould be Executor, or have the Legacy [c]. Likewiſe where the Teſtator ſaith, I make that perſon my Executor, or, I give him an hundred pound, whoſe name is written in a ſchedule in the cuſtody of ſuch a man, whenas indeed there is no ſuch ſchedule to be found, or being found, yet no name therein; this diſpoſition is void [d]. Neither is it ſufficient that a paper or ſchedule be extant, and that the name be therein plainly contained; unleſs alſo it appear by ſufficient proof or lawfull conjectures, that this ſchedule is the very ſame whereunto the Teſtator made relation *.

[c] Minſing. in d. § ex incert. Saltem valet legat. jure can. Felin. in c. 1. de pact. extra.

[d] Bar. in L. ſi ita. ff. de cond. & demon. Cov. in c. cum tibi. de teſt. extra. Simo de Præt. de interp. ult. vol. l. 3. ſeluc. vol. 1. n. 12. * Bar. in d. L. ſi ita. Cov. in d. c. cum tibi. Graſſ. Theſ. com. op. § inſt. q. 16. Mant. de conject. ult. vol. l. 1. tit. 7. n. 7. Clar. § teſt. q. 36. in fin.

If (2) no certain perſon be named at the firſt, but afterwards be made certain by event; the Teſtament or diſpoſition is of no leſs force, then if the perſon had been eſpecially and certainly named at the firſt [f]. For example; the Teſtator maketh that man Executor, or giveth him an hundred pound, which ſhall marry the Teſtator's daughter: in this caſe, whoſoever ſhall marry the Teſtator's daughter, he is to be admitted to the Executorſhip, and may obtain the Legacy, as if he had been named at the firſt [g]. And this concluſion proceedeth whether the marriage be made in the life-time of the Teſtator, or afterwards [h]. Saving where the marriage is made after the death of the Teſtator, if it be likely that the Teſtator would not have made that perſon Executor, or have given him the Legacy, if he had thought that it would fall out that he ſhould have married his daughter, (for that perhaps that perſon was enemy to the Teſtator, or otherwiſe unworthy of any benefit by the Teſtator:) in this caſe the perſon marrying the Teſtator's daughter after his death cannot be Executor, or recover the Legacy [i].

[f] L. quidam. & ibi Bar. de reb. dub. ff. Angel. Are. in d. § incert. Inſt. de legat.

[g] d. L. quidam. de reb. dub. ff. Nec obſtat, quod tutor non poteſt dare ei qui venit aliquo eventu certifican. quia contrar. procedit jure cano. Apoſt. ad Bar. in L. duo. ff. de teſt. tut. Adde quod licet exec. nonnunquam aſſimiletur tutori, (ut per Bar. in d. L. quidam. & per DD. in L. ſi quis à filio. § ſi quis pluries. de leg. 1.) tamen in Anglia aptius comparatur hæredi, qui incertus ex incertis, eventu certificandus, poteſt inſtitui. Are. in d. § ex incertis. Inſtit. de legat. [h] L. uter, cum ſeq. ff. de cond. inſt. Donellus in L. quidam. de reb. dub. Bald. conſil. 188. vol. 5. [i] Donel. in d. L. quidam. de reb. dub. Simo de Præt. l. ult. vol. 128. n. 9.

If (3) a certain perſon be named, but no ſuch perſon be to be found, and the meaning of the Teſtator utterly unknown; it is as if the Teſtator had made no mention of any [k].

[k] L. 2. ff. de his quæ pro non ſcript.

§ VIII. Of Uncertainty arising because there be divers persons of one name.

1. *Where divers persons be of one name, the disposition is void.*
2. *What if the Testator's meaning be known?*
3. *What if the one of them be a familiar friend, the other not?*
4. *What if the one be of kin to the Testator, the other not?*
5. *The disposition* ad pias causas *is not void by reason of uncertainty.*
6. *What if the Testator give somewhat to the Church? what Church is understood?*
7. *What if there be divers Churches of one name?*
8. *If the Testator give any thing to the poor, which poor are to have the same?*
9. *The authority of the Executor testamentary in distributing to the poor.*
10. *What if the Executor make his kin his Executor? who is to be admitted?*
11. *What if the Testator make another's kin his Executor?*

WHere (1) the Testator nameth some one man his Executor, or doth bequeath some Legacy unto him, and there be divers men of that name; this uncertainty maketh void the disposition [a]. For example; the Testator maketh *Titius* his Executor, whereas there be divers persons so called; or, to speak after the manner of our temporall Lawyers, the Testator maketh *John at Stile* his Executor, or giveth to him an hundred pound, and there be two persons called *John at Stile*, and the Testator maketh no difference, but leaveth it uncertain of whom he did mean: in this case neither of them can obtain the Executorship or Legacy [b].

But (2) if the one of them do prove that the Testator did mean that he should be Executor, or have the Legacy, it is sufficient for the obtaining of the Executorship or Legacy [c].

Or if (3) one of them appointed be one of the Testator's familiar acquaintance, and his friend, the other a stranger; in this case the stranger is excluded, and the other admitted [d]. Or both of them being friends, yet if one of them be joyned in greater friendship with the Testator then the other, he is to be preferred to the Executorship or Legacy before the other*.

Or if the one of them (4) be of kin to the Testator, and the other not of kin, the kinsman is to be preferred [f]: and if they be both Cosins, then I suppose that whether of them were to be admitted to the Administratorship, in case the Testator had died intestate, that he is to be admitted to the Executorship [g].

[a] L. si quis. § si inter. ff. de leg. 2. Bald. in L. hac consultissima. C. qui test. fac. poss. n. 4.

[b] DD. in d. § si inter.

[c] Bar. in L. quidam. ff. de reb. dub. Simo de Præt. de interp. ult. vol. l. 1. fol. 97. n. 1.

[d] L. quem hær. ff. de cond. & demon. Mantic. de conject. ult. vol. l. 8. tit. 4. n. 5.

* Simo de Prætis de interp. ult. vol. l. 1. fo. 100. n. 3. Manr. de conject. ult. vol. l. 8. tit. 4. n. 5.

[f] L. cohæred. § qui discretas. ff. de vulg. sub. Mantic. de conject. ult. vol. l. 8. tit. 4. n. 5.

[g] Jas. in L. 1. § hoc autem. ad Trebel. lect. 3. ff. Simo de Prætis de interp. ult. vol. 1. fol. 98. n. 9. Mantic. de conject. ult. vol. l. 4. tit. 6. n. 3, 4.

Or

Or if (5) the diſpoſition be made *ad pias cauſas*, it is not void by reaſon that the name is common or agreeable to divers. And therefore (6) if the Teſtator doth bequeath any thing to the Church, not expreſſing what Church he doth mean, the diſpoſition is not void, but is to be underſtood of his Pariſh-church [h]. And if the Teſtator name a Church, and (7) there be divers Churches of that name, it is to be underſtood of his Pariſh-church [i]. For example; the Teſtator doth bequeath to *S. Peters* Church in *Oxford* an hundred pound, where there be two Churches of that name: this diſpoſition is not void; but the bequeſt is due to the Teſtator's Pariſh-church, or where he did more uſually reſort to pray to God, or to hear his word [k]. And if neither of them be his Pariſh-church, neither can it appear that the Teſtator did more frequent the one then the other; or, on the contrary, if both of them were his Pariſh-churches, for that perhaps he kept a family in either Pariſh, and did equally frequent either Church: in theſe caſes, by the opinion of ſome Writers, the Legacy is to be divided betwixt the Churches [l]. But by the opinion of the more part, it is in the power of the Executor, or if the Executor do refuſe to prove the Will, or that there be no Executor appointed by the Teſtator, then it is in the power of the Ordinary, to beſtow the ſame Legacy on whether Church he thinketh good [m], as the conſideration of divers circumſtances ſhall induce him: wherein (amongſt other things to be remembred by the Ordinary) this is not to be forgotten, *videlicet*, whether Pariſh is the poorer [n].

[h] Gloſ. in L. quidam. ff. de reb. dub. Abb. in c. judicante. de teſta. extr. Bar. & Jaſ. in L. 1. de ſacroſan. eccleſ. C. Graſ. Theſ. com. op. § Inſtit. q. 11. & § Legatum, q. 64. Mant. de conject. ult. vol. l. 8. tit. 6.

[i] Bar. in L. conditione. § cum ita. ff. de cond. & demon. Pan. in c. judicante. de teſt. extra.

[k] Et hæc eſt com. opait Jaſ. in L. qui inſulam. ff. de verb. ob. Graſ. Theſaur. com. op. § legatum. q. 64. Covar. in d. c. judicante. de teſta. extra.

[l] Bar. in d. c. jud. & ibi Cov. aſſerens hanc opin. eſſe veriorem.

[m] Hoſtienſ. & al. in c. jud. quorum op. eſſe com. fatetur Cov. in d. c. jud. Idem quoque dic. Graſ. Theſ. com. op. & leg. q. 64. Ben. Cap. regul. & fal. reg. 113. [n] Gloſ. in d. c. judicante. Mant. de conjec. ul. vol. l. 8. tit. 5. n. 5.

In like manner if the Teſtator (8) make the Poor his Executors, giving them the reſidue of his goods; this diſpoſition is not void by reaſon of uncertainty, for that it is a Teſtament *ad pias cauſas* [o]. By the poor therefore in this place is underſtood the poor of the Pariſh where the Teſtator did dwell and keep houſe [p]; for it is likely that he did bear a great affection to the poor where he dwelled [q]; eſpecially alſo if the Teſtator were buried in the ſame place [r]: and therefore the Ordinary in this caſe ought to provide that the poor have their due, according to the meaning of the Teſtator †. But if the (9) Teſtator do bequeath a certain ſum to be diſtributed amongſt the poor, and do appoint an Executor; then it is the office of that Executor to diſtribute the ſame [t]: who in the diſtribution thereof is not neceſſarily tied to beſtow it wholly upon the poor of that City, Pariſh, or place, where the Teſtator did dwell [v]; (unleſs the Teſtator did mean that the ſame ſhould be beſtowed on them alone [x];) neither is he preciſely tied to

[o] Tiraquel. tract. de privileg. piæ cauſ. privil. 56.

[p] L. quis ad declin. § ubi. C. de epiſc. & cler. gloſ. in c. ſi pater. verb. pauper. de teſta. l. 6. Covar. in c. eum tibi. de teſt. extr. Mantic. de conject. ult. vol. l. 8. tit. 5. n. 2.

[q] Mant. d. tit. 5. n. 2.

[r] Panor. conſil. 99. l. 2. n. 4.

† L. nulli. C. de epiſc. & cler. d. c. judicante. de teſta. extra. & gloſ. ibid.

[s] Mant. de conject. ult. vol. l. 8. tit. 5. n. 2. [t] Gem. & Franc. in c. ſi pater. de teſta. l. 6. [u] Mant. d. tit. 5. n. 2.

make

make choice of the pooreſt perſons [y]; but may uſe a farther liberty, ſo that he do not abuſe the ſame [z]. For he may not ſo make choice of any perſon, as it may ſeem to oppugn the Teſtator's liking and meaning [a]: neither may he beſtow the whole Legacy upon one perſon alone [b], nor upon himſelf, nor his children, unleſs they be very poor [c], nor upon ſuch perſons as will unthriftily ſpend it; but upon ſuch poor to whom it may doe good: and eſpecially if the kinsfolks of the Teſtator be poor, and of the ſame Pariſh where the Teſtator did dwell, they are to be preferred [d].

[y] Bar. in L. unum ex famil. § 1. ff. de leg. 2. Bald. in rep. L. 1. de ſacroſan. eccleſ. C. Mant. d. tit. 5. n. 6.
[z] Par. conſil. 45. vol. & Mant. d. tit. 5. n. 8.
[a] Angel. in L. ſed & ſi. § ſi libertis. ff. de jud. Pariſ. conſil. 26. vol. 4. n. 29.
[b] Bar. in L. 1. ff. de op. leg. Bald. in rep. L. 1. C. de ſacroſa. eccle. Mant. de conject. ult. vol. l. 8. tit. 5. n. 18, 19. [c] Brook tit. exec. n. 116. & tua nos. de teſt. extr. Imol. in Cl. 1. de teſt. Mant. d. tit. n. 9. [d] Bald. in L. illa. Inſt. ff. de hær. inſt. Pariſ. conſil. 26. vol. 4. Mant. de conject. ult. vol. tit. 5. n. 17.

Hereunto it may be added, that if the (10) Teſtator make his kin his Executor, or give his goods to his kin, that this diſpoſition is not void; but that they which be in the next degree of kindred to the Teſtator, to whom the Adminiſtration of his goods was to be committed, if he had died inteſtate, are to be firſt admitted to the Executorſhip *, or to injoy the Legacy during their lives [f]; and after their deaths, the other next of kin to the Teſtator are to be admitted one after another, ſucceſſively by degrees, and not all together [g]: ſaving where the Teſtator doth make (11) another's kindred his Executor, or doth bequeath ſome Legacy to any other's kin: for then they are all to be admitted together, without reſpect or degree, nearer or farther off [h]. The reaſon of the difference is, becauſe the Teſtator is not preſumed to carry an equall affection towards every of his own kin, but to him that is nearer of kin greater love, and to him that is farther off leſſer: and therefore of his own kindred the beſt beloved is firſt preferred: which inequality of good will is not preſumed towards another's kindred, and therefore they are admitted without difference [i].

* Jaſ. in L. Gallus. § quidam recte. ff. de l. & poſthu. Tiraquel. de retract. Lignagier. § 11. gloſſ. 12. Graſ. Theſ. com. op. § Inſt. c. 20. n. 12. Bar. in L. ſi contingat. ff. de reb. dub. q. pen.
[f] Bar. in L. cum ita. § fin. ff. de leg. 2. Pariſ. conſil. 49. vol. 2. Graſ. Theſ. com. op. § legat. q. 41. & § fidei commiſſum, q. 16.
[g] Paul. de Caſtro in d. L. cum ita. § fidei commiſſ. Cujus op. com. eſt, ut refert Par. conſil. 11. n. 28. vol. 3. Covar. in c. Ranutius. § 2. de teſt. extra. Graſ. Theſ. com. op. § fidei commiſſum, q. 16. [h] Bar. in L. ſi cognatis. ff. de reb. dub. Simo de Prætis de interp. ult. vol. l. 3. fo. 91. n. 28. Graſ. Theſ. com. op. § Inſtitutio. q. 20. n. 10. Jaſ. in L. Gallus. § quidam recte. ff. de l. & poſthu. n. 28. [i] Bar. & Simo de Prætis ubi ſupra.

It hath not onely been a queſtion amongſt the beſt Lawyers in this Land, whether the mother be of kin to her child ‖; but after much diſputation, it hath been alſo adjudged for the negative, *viz.* That the mother is not of kin to her child. As appeareth in the Caſe commonly known by the name of the Duke of *Suffolk*'s Caſe, very famous in many books *, (though more famous for the rareneſs then for ſoundneſs,) which Caſe was this. In the Reign of King *Edward* the Sixth, *Charles*, Duke of *Suffolk*, having iſſue a ſon by one venter, and a daughter by another venter, made his laſt Will, wherein he deviſed goods to his ſon, and ſo died. After whoſe death the ſon died alſo inteſtate, without wife, and without iſſue, his mother and his ſiſter by the father's ſide (for ſhe was born of the former venter) then living. The mother took

‖ Brook Abridg. tit. adminiſtr. n. 47.

* Brook ubi ſupra. Dom. Coke l. 3. in Ratcliffs caſe, cum ſimilib.

took the Adminiſtration of her ſon's goods, according to the Statute [m], whereby it is enacted, that in caſe any perſon die inteſtate, the Adminiſtration of his goods ſhall be committed to the next of kin, &c. The Adminiſtration being thus granted to the mother, the ſiſter by the father's ſide doth commence ſuit before the Eccleſiaſticall Judge, pretending her ſelf to be next of kin, and the mother not of kin at all to the party deceaſed, and therefore deſireth the Adminiſtration formerly granted to the mother to be revoked, and to be committed unto her, as next of kin to the deceaſed, by force of the ſaid Statute [n].

[m] Sta. H. 8. an. 21. c. 5.

[n] Vide ſupr. eod. l. part. 6. § 1. n. 3. Brook ubi ſupra.

Hereupon the moſt learned, as well in the Laws of this Realm as in the Civill Law, were conſulted. Firſt, whether an Adminiſtration once granted might afterwards be revoked: whereunto they all agreed that it might. Secondly, whether the mother were next of kin to her ſon: whereunto not onely the Temporall Lawyers, but alſo the Civilians, (as it is reported) were of this opinion, that ſhe was not of kin to her own ſon. Whereupon by definitive judgment of the Court, the former Adminiſtration granted to the mother was revoked, and a new Adminiſtration granted to the ſiſter, albeit ſhe were of the half bloud to the deceaſed. According to this Judgment divers other Adminiſtrations were granted, from the mothers, to the brethren and ſiſters, as next of kin to them dying inteſtate, for divers years after [o]. The reaſons which moved the Temporall Lawyers to be of this mind, that the mother ſhould not be of kin to her own child, were eſpecially theſe. Firſt, becauſe there is a ground or principle in their Law, that lands cannot lineally aſcend, but deſcend [p]: whereupon they concluded, that goods and chattels might lineally deſcend, but not aſcend [q]. Secondly, becauſe howſoever children be of the bloud or ſeed of their parents, yet are not parents of the bloud or ſeed of their children; for ſo they write, *Liberi ſunt de ſanguine patris & matris, ſed pater & mater non ſunt de ſanguine liberorum* [r]. Thirdly, becauſe the father, the mother, and the child, though they be three perſons, yet are they but *una caro* †, one fleſh, and conſequently no degree of kindred betwixt them.

[o] Veluti in caſu inter *Brown* & *Shelton*, cum aliis.

[p] Littleton Tenures, l. 1. fo. 1.

[q] Brook Abridg. tit. adminiſt. n. 47.

[r] Ibidem.

† Brook ubi ſupra, poſt Iſidor.

What might be the reaſons whereby the Civilians were moved to be of the ſame opinion, that the mother was not of kin to her child, I cannot eaſily conceive; unleſs it were this, viz. *Mater non numeratur inter conſanguineos* [t]: or unleſs it were the ancient law of the Twelve tables, whereby the mother was excluded from ſucceeding in the inheritance of her ſon or daughter [v]. Thus was the judgment in this caſe, and theſe were the chief reaſons thereof; which reaſons not being very ſtrong, the judgment could not be very ſound. For firſt, though it be a Maxim in the Laws of this Realm, that lands cannot lineally aſcend from the child to the parents [x], (which Maxim ſeemeth alſo to ſavour of the law of the Twelve tables [y], being the moſt ancient part of the Civill law written [z], whereby (as I have ſaid) the mother was for-

[t] Bald. in L. ult. C. de verb. ſignif.

[v] Inſtit. l. 3. tit. de S.C. Tertill. in princ.

[x] Littleton fo. 1.

[y] Inſtit. d. tit. de S.C. Tertill. in princ.

[z] Initio civitatis, cum omnia manu regia gubernarentur, nullæ ſcriptæ fuerunt leges, ſed arbitria principum pro legibus erant. Anno autem ab urbe condita 303. conſcriptæ latæque ſunt leges 12 tabularum. L. 2. ff. de origin. jur. & Weſen. cod. tit.

bidden to ſucceed in the inheritance of her child [a]; yet nevertheleſs it doth not thereby follow, that Parents be not of kin to their children, becauſe they cannot ſucceed them in the inheritance, no more then the child ceaſeth to be of kin to his Parents, when he is diſherited or barred to ſucceed in the inheritance. And touching the law of thoſe Twelve tables, it was not onely thereby ordained, that the mother ſhould not ſucceed in the inheritance of her children; but likewiſe, that the children ſhould not ſucceed in the inheritance of their mother [b]: which prohibition notwithſtanding, the kindred ſtill remained entire betwixt the Parents and their children *hinc & inde* [c].

[a] Inſtit. de S.C. Tertil. in princ.

[b] Ibidem.

[c] Inſtit. de gradibus cognat. § 1. lib. 3. L. ult. ff. de grad. aff.

And ſo much doth Mr. *Littleton* (no leſs honourable for his profound knowledge in the Laws of this Realm, then authenticall for his antiquity) plainly acknowledge, to wit, that the Parent is more nigh of bloud unto the child then the Uncle [d], notwithſtanding that ground in their law, namely, that inheritance cannot lineally aſcend. Which concluſion is alſo agreeable to the Civil Law, being much more ancient then old *Littleton*, whereby it is manifeſt, that as the ſon and the daughter be in the firſt degree of kindred in the line deſcendent, ſo the father and mother be in the firſt degree of kindred in the line aſcendent *.

[d] Littleton tenures, fol. 1.

* Inſtit. tit. de gra. cognat. § 1. Adde & perluſtr. arborem conſanguinitatis in fine lib. 4. decret. dep. & Jo. And. lectur. cum commentar. ſuper arbore conſang.

Touching the ſecond reaſon, although it be true, that children be of the bloud or ſeed of their Parents, but that the Parents are not of the bloud of their children [f]; yet doth it not follow, that Parents are not therefore of kin to their children, becauſe they ſpring not out of their bloud, nor deſcend from their loyns: for the brother doth not ſpring from the bloud nor deſcend from the loyns of his brother, but both of them ſpring from the bloud and ſeed of their father †, as two branches from one root or ſtock; and yet who can deny them to be of kin the one to the other? So then it is ſufficient for kindred to agree *in tertio* [g], or to flow from one fountain, or grow from one root; though one of them do neither flow nor grow out of the other. If you enquire, how then doth the father and his ſon, or the mother and her daughter, grow from one and the ſame ſtock or root? you muſt underſtand, that the common ſtock or root, from whence not onely the father and mother, but alſo their ſons and daughters do grow, is the Grandfather. So did *Iſaac* and *Jacob* alſo ſpring from the loyns of *Abraham*; *viz.* *Iſaac* the ſon immediately, and *Jacob* the grandchild mediately, the one in the firſt degree, and the other in the ſecond degree, to *Abraham*, being the common ſtock to them both, and to their poſterity [h]. Hence it is, that *Cognati* or *Agnati* be ſo called, *quaſi ab uno nati* [i]; and *conſanguinitas*, *quaſi ſanguinis unitas* [k]. And hence it is, that conſanguinity or

[f] Brook abridg. tit. adminiſtr. n. 47. Covar. de ſponſal. par. 2. c. 6. § 6. n. 3.

† L. 1. ff. de grad. aff. in princ. Melch. Kling. tract. de conſ. matrimon. fol. 46. Lectur. Jo. And. cum commentar. ad arborem conſang. Covar. ubi ſupra, n. 2.

[g] Vide ſupra in commun. ſtipit. lectur. Jo. And. ad arborem conſang. cum commentar. Philipp. Melanc. de arb. conſ. Kling. ubi ſupra.

[h] Jo. And. Melch. or Kling. Philipp. Melanch. & Georg. Major de arbor. conſang. ram civili quam can.

[i] L. 1. ff. unde cognat. Rebuff. in L. in vulgari. ff. de verb. ſignif.

[k] Jo. And. & Georg. Major ubi ſupra.

kindred

kindred is defined to be *vinculum perſonarum ab eodem ſtipite deſcendentium, carnali propagatione contractum*[i], A bond of perſons knit together by bloud or carnall propagation, deſcending from one ſtock.

[i] Jo. And. Philip. Melan. & Georg. Major in ſuis tractatibus de conſang. & ff. eod. tit. Covar. tract. de quorum controverſiis magnopere non laboro.

Alias definitiones videre licet apud alios authores, veluti apud Hoſtienſ. in ſumm. de ſponſal. 2. part. c. 6. § 6. Præpoſ. in tit. de conſang. & aff. & de arbore conſang.

Whereby it may be concluded, that Parents be of kin to their children, like as *Iſaac* was to *Jacob*, for that they both came of the ſeed of *Abraham*; and conſequently that the mother is of kin to her child, notwithſtanding ſhe ſpring not from his bloud, becauſe they both ſprang out of one common ſtock, being her Father, and her child's Grandfather. And therefore by the Laws of this Realm, if a man die ſeiſed of lands holden in ſocage, his heir being within the age of fourteen years, in this caſe the mother ſhall have the wardſhip of her ſon, as being next of kin, to whom the lands cannot deſcend[a].

[a] Stat. de Marlebridge edit. anno 52. H. 3.

Touching the third reaſon, it is more feeble then either of the former. For although it may not be denied, but that the father and mother, being man and wife, are *una caro*[b], one fleſh; yet it is not to be granted that the Parents and their children are one fleſh, otherwiſe then as they agree in a third, by proceeding from one root, as is afore ſaid. Or if it were granted that they were *una caro*, and conſequently no degree of kindred betwixt them; by this argument, as Parents ſhould not be of kin to their children, becauſe they are both one fleſh; ſo children ſhould not be of kin to their Parents by the ſame reaſon, being *commune argumentum*[c].

[b] Gen. 2. 23. Matth. 19. 5.

[c] Argumentum commune facile retorquetur, quo ſi quis utatur, ſtatim ſuo ipſius gladio jugulatur. Everard. de locis arg. legal. in præamb.

Now as touching the reaſons which peradventure did induce the Civilians to be of opinion that the mother was not of kin to her child; true it is, that the mother is not properly comprehended *inter conſanguineos*[d], becauſe properly and ſtrictly, *conſanguinei* doth onely comprehend them which be of kin by the father's ſide *. Whereby we may underſtand, that this Engliſh word *kin* is more large then the Latine word *conſanguinei*; which thing is ſo well known to the learned in that Law, as I doubt whether this were any of their reaſons of denying the mother to be of kin to her child[f]. And albeit the moſt ancient law of the Twelve tables was very ſevere againſt the mother and her children, and did mutually expell them both, *ut ne quidem inter matrem, filium, filiamve, ultro citroque hæreditatis capiendæ jus daret*[g], ſo that neither ſhe ſhould ſucceed them, nor they her, in the inheritance:

[d] Bald. in L. ult. C. de verb. ſignif.

* Fran. in c. ſciant. de elect. 6. 2. Alex. conſil. 229. n. 10. vol. 6.

[f] Dictio conſanguinitas, proprie ſumpta, non Cognatos, ſed Agnatos comprehendit. At communi loquendi uſu complectitur etiam ex fœmineo ſexu conſ. Alex. & Franc. ubi ſupra.

[g] Inſtit. de S. C. Tertil. in princ.

heritance: yet upon better consideration, by the clemency of the honourable Prætor, and piety of succeeding Emperours, was this rigorous law of the Twelve tables altered [h], and the mother admitted to succeed her children, *ad solatium liberorum amissorum*, for comfort and in recompence of the loss of her children [i].

[h] De variatione juris civilis in deferenda Matri successione filii intestati, & è contra, videas velim Minsing. de S. C. Tertill. l. 3. Instit.

[i] Jure Novellarum in universum statutum est, patri matrique pariter deferri successiones filiorum sine liberis decedentium, simulque cum iis admitti fratres sororesque ex utroque parent. & conseq. de l æred. ab intestat. Authen.

The reasons of this judgment being thus removed, it is now time to consider what became of the judgment it self. True it is, that in those days this example did so much prevail, that many judgements passed accordingly upon the like case [k]: but yet in process of time the truth prevailed, (for what is stronger then truth?) and the mother was every-where adjudged to be of kin to her child [l]; who dying intestate, and without issue, the Administration of his goods may be committed unto her (if the Ordinary in discretion so think good) as next of kin, according to the Statute [m]. Or if he do not die intestate, but maketh his kin his Executor, or doth bequeath the residue of his goods to his kin; the mother in this case (where there are no children) is to be admitted Executor, and to enjoy the Legacy as next of kin to her child [n] during her life; and after her death the other next of kin [p]. But if the Testator do not bequeath his goods to his kin, but to the next of his kin, nor make his kin Executor, but the next of his kin, the mother, being next of kin, (where the Testator dieth without issue,) shall be his Executor simply, and enjoy all his goods, not onely for her life, but dispose thereof at her death to whom she will.

[k] Brook tit. administr. n. 47. Cas. inter Browne & Shelton.

[l] Juxta dict. Novel. de hæred. ab intestat. § si igitur.

[m] Stat. H. 8. an. 21. c. 5.

[n] Per d. § si igitur. de hæred. ab intestat. Novell.

[p] DD. in L. cum ita. § fin. ff. de leg. 2. Grass. Thesaur. com. opin. § fidei commis. q. 16.

§ IX. Uncertainty arising by reason of alternative or disjunctive speech.

1. *The Executor saying*, I make A. or B. Executor, *it is as if he had said*, I make A. and B. Executor.
2. *What if the Testator be more affected to the one then to the other?*
3. *What if the election be referred?*
4. *What if the one be capable, the other not?*

THE alternative (1) or disjunctive speech of the Testator in making Executors, or disposing of any Legacy, doth not hurt the Testament [a]. And therefore if the Testator say, *I make A. or B. my Executors*, or, *I bequeath to such or such a person a hundred pound*; this disposition is not void, but both of them shall be admitted Executor, and both of them obtain the Legacy, to be divided betwixt them [b].

And albeit at the first there was great dissension and conflicts in opinions about this question; at last it was established for law, that

[a] L. cum quidam. C. de verb. signif.

[b] d. L. cum quidam. & DD. ibidem.

that this word [*or*,] in favour of Testaments, should be taken for [*and*[c],] when it is so placed betwixt two persons, as it may seem to minister doubt to the hearer, of whether person the Testator did mean[d]. And therefore the Testator saying, *I make A. or B. my Executors*, it is in effect as if he had said, *I make A. and B. Executors* *, &c. Which conclusion notwithstanding is sometimes limited, and one onely of the persons is to be admitted.

[c] Text. in d. L. cum quidam.

[d] § melius. in d. L. cum quidam.

* d. § melius.

The first Limitation is, when (2) the Testator doth bear more affection to the one then to the other; for then he to whom the Testator beareth more affection is to be preferred before the other[f]. For example; the Testator saith, *I make my brother, or his children, my Executors*, or, *I bequeath to my brother, or his children, such a thing*: in this case, forasmuch as the Testator is presumed to carry a greater love to his brother then to his brother's children, he shall first be admitted to the Executorship, and obtain the Legacy, and enjoy the same during his life; and after his decease, his children then shall be admitted[g]. But this unequall order of affection hath not such unequall effect when the Testator doth make his brother and his children Executors, by this word [*and*,] or [*with*,] as before hath been declared; for then they be all admitted equally, and not successively[h].

[f] Ripa in c. inter cæteras. de rescrip. extra. n. 54. Paris. consil. 21. vol. 3. Jul. Clar. § testm. q. 80. n. 5.

[g] L. cum pater. § ff. de leg. 2. Bald. in c. 1. de eo qui sibi & hæred. suis. lib. feud. Jul. Clar. d. q. 80. n. 5.

[h] Jas. in L. Gallus. § quidam recte. ff. de li. & posthu. Clar. § testm. q. 80. n. 6. quæ opinio ab omnibus juris interp. est recepta, ait Clar. eod. n. 6.

Another Limitation is, when (3) authority is granted to another of making election. For example; the Testator maketh his Executors A. or B. whom the Ordinary shall chuse, or giveth an hundred pound to A. or B. whom the Executor shall chuse: in this case, this disjunctive [*or*] standeth properly, and is not changed into a conjunctive; and so election being made of the one, the other is excluded[i].

[i] L. fi Titio aut Servio. de leg. 2. L. utrum. § cum quidam. de reb. dub. ff.

Another Limitation is, when (4) the one of the persons is not capable of the Executorship or Legacy: for then also the disjunctive standeth properly, and the other person alone shall obtain the Executorship or Legacy[k].

[k] Jas. in L. cum quidam. C. de verb. signif. limit. 5. quippe qui alias habet in eo loco istius regulæ limitationes.

§ X. Of uncertainty respecting the Thing bequeathed.

1. *Whether uncertainty by reason of generality in the Thing bequeathed doth make void the disposition.*
2. *Whether the disposition be void, when that is bequeathed which of the Logicians is called* Species.
3. *Whether the Legacy of wine or corn, no quantity being expressed, be void.*
4. *By the equity of the Ecclesiasticall Laws, uncertain Testaments are saved from destruction.*
5. *Who ought to chuse, where a Legacy is given generally, the Executor, or the Legatary.*
6. *The manner of election.*
7. *Of Legataries, who must chuse first.*
8. *If Collegataries dissent amongst themselves, what means is to be used.*

THat the disposition or bequest is sometimes overthrown or destitute of effect by reason of the uncertainty of the Thing bequeathed, may appear by that which hath been already spoken of error in the thing bequeathed [a]: for by what means the Testator doth erre, by the same means is his disposition made uncertain: concerning which kind of uncertainty, whether it destroy the Legacy or no, doth there appear. Now therefore of some other kind of uncertainty respecting the Thing bequeathed, and namely whether the uncertainty growing by occasion of generality make void the bequest or not.

[a] Supra ead. parte, § 5.

First, when (1) any thing is bequeathed under such generall words, that the meaning of the Testator is unknown, the disposition remaineth without effect: as when the Testator saith, *I do bequeath some thing*, or, *I bequeath a substance*, or, *I bequeath a body*, or, *a living creature* [b]. For that which the Logicians call *genus*, either *generalissimum* or *subalternum*, being bequeathed, the Executor is said to be delivered, if he give but a piece of Bread, or a Fly [c].

[b] Gloss. & DD. in L. legato generaliter. & L. si domus. ff. de leg. 1.

[c] Accurs. Bar. & communiter DD. in d. L. legato. quamvis Zasius in d. L. & Jo. Rub. lib. 2. sententiarum, c. 14. dicunt, inutile quidem esse legatum; non tamen quia hæres dando quid minimum liberetur, sed quia effusum adeo & incertum est legatum, ut inutilem, potius quam utilem, actum concipere voluisse testator intelligatur.

If the (2) Testator bequeath such a thing which in Logick is called *species* [d], and in Law *genus*; then we are to consider whether the same thing do receive his limits of Nature, as an horse, a tree, &c. or of a Man, as a ship, a gold chain; or of Weight, Number, or Measure, as lead, money, wheat *, &c.

[d] Quod enim Dialecticis est species, Juristæ genus appellant: quemadmodum & species dicitur à Jurisconsultis id quod Dialectici appellant individuum. Minsing. in § si generaliter. Instit. de legat. * Zas. lib. 1. Sing. respons. in princ. n. 33. Minsing. in d. § si generaliter.

In the first case, *viz.* if the Testator bequeath an Horse, the bequest is good, whether the Testator have any or none [f].

[f] Bar. Paul. de Cast. & omnes Doctores in d. L. legato.

In the second case, *viz.* if the Testator bequeath a Ship, or a gold Chain, by the common opinion of Writers, the Legacy is void [g], unless the Testator have a ship, or a chain. But others are of opinion, that the Legacy is good, although the Testator have no ship or chain [h]. And this opinion seemeth more reasonable, and more agreeable to the equity of the Ecclesiasticall laws [i]; especially if the Testator knew that he had no ship or chain of his own, when he made his Will.

[g] Angel. & Alex. in L. si domus. ff. de leg. 1. Jas. in eand. L. n. 16. ampl. 2. & 3. Bar. & Dec. in L. quod in rerum. § & si Navem eod.

[h] Zas. Sing. li. 1. c. 1. n. 42, 43, &c. Peckius de test. conjug. li. 5. c. 26. Minsin. in § sed si generalit. Instit. de lega. n. 9, 10. Claud. cautiuncula, & alii, de quibus Peckius in d. c. 26. Qui hanc sententiam ut veriorem defendunt in re magis dubia, nempe in domo simpliciter legata. Grass. § legatum. q. 61. n. 4. in fin.

[i] Zas. in L. Triticum. & in L. ita stipulatus. de verb. ob. ff.

In the third case, *viz.* if the Testator do bequeath Lead, or Money, or Wheat, not expressing the quantity, the bequest is unprofitable, because of the great uncertainty: at least it seemeth the Executor is delivered by delivering a very little [k]. Howbeit if the Legacy consisting

[k] L. nummis. ff. de leg. 3. Gloss. in d. L. legato.

in

in weight, number or meaſure, be diſpoſed for the performance of ſome act, or other certain conſideration, as for the building of ſome bridge, or amending of high-waies, or for the education or alimentation of ſome perſon, or maintaining him at ſtudy, or for the relief of the poor, or for the repairing of the Church, or for other like uſes: in theſe caſes the Legacy is not void, albeit no quantity be expreſſed; for ſo much is underſtood to be diſpoſed, as may ſatisfy or anſwer that purpoſe whereunto it is appointed, and as the Ordinary, conſidering the neceſſity of the thing, and the ability of the Teſtator, and the continuance of the gift, ſhall deem convenient [l].

Moreover, by the (3) equity of the Laws Eccleſiaſticall, not onely the Legacy general of things conſiſting in weight, number or meaſure, as of Wine, of Oil, of Corn, of Iron, of Braſs, of Mony, &c. is good and available, without any quantity expreſſed by the Teſtator, which quantity is underſtood to be left to the diſcretion of the Ordinary, to be limited by him as due circumſtances ſhall induce him [m]: but alſo by the ſame (4) equity, it ſeemeth that the generall Legacy even of that which the Logicians call *genus* (which may be verified of things different in kind) is not void [n]. But 'tis to be certified and declared by the Ordinary, according to the eſtate of perſons, the common cauſe, and whatſoever may be collected by other circumſtances [o]. Much leſs is the Legacy void, where the Teſtator doth bequeath a certain quantity of corn, or wine, or other things, conſiſting in number, weight, or meaſure, not expreſſing the kind of Corn, *viz.* Wheat, Rie, or Barly, or of Wine, *viz.* White, Sack, or Claret [p].

[l] Zaſ. in L. ita ſtipulatus. de verb. ob. ff. n. 14, 15. & Ripa in can. L. n. 19, 20, 21, &c.

[m] Archid. in c. ſunt nonnulli. 1. q. Abb. in c. 1. de dec. extr. gloſſ. & DD. in c. nos quidem. de teſta. extra.

[n] Verum, ſi animal legatum fuerit. Zaſ. in L. Triticum. ff. de verb. ob. n. 11. Archid. in c. ſunt nonnulli. 1. q.

[o] Zaſ. ubi ſupra. &

in L. ſi ita ſtipulatus. ff. de verb. ob. & ibi Alex. & Ripa.

[p] Zaſ. & Ripa in d. L. ſi ita ſtipulatus.

Here it may be demanded, Who ſhall (5) chuſe, where the Legacy is generall, the Executor or Legatary? To this queſtion thus: If the Teſtator do expreſsly grant the election, the doubt is eaſily anſwered; He to whom the election is granted [q].

If there be no expreſs grant made by the Teſtator, then if the words of the diſpoſition be directed to the Legatary, as if the Teſtator ſhall ſay, I will that A. B. ſhall have a horſe; the election belongs to the Legatary [r]. But if the words of the diſpoſition be directed to the Executor, as if the Teſtator ſay, I will that my Executor give to A. B. a horſe; then the election appertains to the Executor [t]. If the words be not directed to the Executor nor to the Legatary, it is anſwered, that if the thing bequeathed have his limits aſſigned of Nature, then the election is in the Legatary, in caſe ſuch things be extant among the Teſtator's goods: and in caſe there be no ſuch extant, the election is in the Executor [u]. But if ſo be that the thing bequeathed be limited by Man, the election doth appertain to the Executor [v]. And ſo it

[q] Graſſ. Theſaur. com. op. § legatum. q. 61. in prin. Lanc. Dec. & Jaſ. in L. legato. ff. de leg. 1.

[r] Gloſſ. in L. lucio. ff. de leg. 2. & hæc opinio communis eſt, teſte Graſſ. d. § legatum. q. 62. n. 2.

[t] Covar. in c. judicante. de teſta. ext. n. 3. Zaſ. & alii in d. L. legato. quorum opinio communis eſt, ut per Graſſ. ubi ſup.

[u] Gloſ. Alex. Jaſ. Zaſ. in d. L. legato generaliter. & horum ſententia communis eſt, ait Graſ. d. q. 62. n. 3.

[v] Jaſ. in d. L. legato. n. 20. Graſſ. d. q. 62. n. 3. verb. aut vero. Contrarium Minſing. in d. § ſi generaliter. n. 9, ſed prior opinio eſt communis, ut per eundem Graſſ.

is of

is of things conſiſting of number, weight, or meaſure [x], albeit there be of thoſe things extant amongſt the goods of the deceaſed [y]; much more if there be none extant [z].

[x] L. leg. 4. ff. de Tritic. vin. & oleo leg. Zaſ. in d. L. legato. n. 18.

[y] Atque hæc opinio communiter approbatur, ſive teſt. de certo ſenſerit, ſive non; ut per Graſſ. ubi ſupr. qui tamen diſtinguit.

[z] Minſ. in d. § ſi generaliter. n. 7. Zaſ. in d. L. legato. in fin.

Provided (6) alwaies, that of thoſe things which be extant, the Legatary, having the benefit of election, muſt not chuſe the very beſt [a]: unleſs there be no more but two of the things extant, (for then he may chuſe the better [b];) or unleſs the Teſtator do grant election, for then he may chuſe the beſt [c]. And likewiſe on the contrary part, where the election belongeth to the Executor, he may not obtrude to the Legatary the very worſt of thoſe things which be extant in the patrimony [d]: and whereas there be not any ſuch things amongſt the Teſtator's goods, the Executor muſt provide ſome competent thing *.

[a] Gloſſ. in L. ſi quis à filio. § ſi quis plures. ff. de leg. 1. Zaſ. in d. L. legat. general. n. 13, 14. Minſing. in d. § ſi generaliter. n. 6.

[b] L. ſi ſervus. § cum homo. ff. de leg. 1. Zaſ. in d. L. leg. n. 14.

[c] L. 2. ff. de option. leg. & Weſenb. in eund. tit. n. 1. Per. L. in teſt. de reg. jur. ff. E regione ſtat. Zaſ. ſcribens, quod etiamſi legatario datur optio, non tamen optima, ſed mediocria, ſunt eligenda. in d. L. leg. n. 13.

[d] DD. in d. L. legato. Covar. in c. jud. de teſt. extr. n. 3. & hoc indubitat. in Spec. Sed in quantitatibus & in ſummis, quod minimum eſt deberi intelligitur, ſi Caſtrenſi credamus, in d. L. legat. n. 4. Verum in hujuſmodi legat. ſervandum eſt boni viri arbitrium. Archid. in c. nonnulli ſunt. 1. q. Abb. in c. 1. de dec. extr. 6.

* Zaſ. in d. L. legato. n. 22. poſt gloſſ. ibidem.

Furthermore, it is to be remembred, that (7) if the Teſtator having two things, whereof the one is much better then the other, (be it for example two horſes,) do bequeath to two perſons either of them a horſe; he that is firſt named in the Teſtament may firſt chuſe [f].

[f] Bar. in L. qui duos. ff. de leg. 1. quæ ſententia communiter approbatur, ut refert Graſſ. d. § legatum. q. 62. in fin.

Finally, this is not to be omitted, That if the (8) Legataries diſſent about the election of the thing bequeathed, this controverſy is to be decided by lot, if it be not otherwiſe reſolved who in that choice is to be preferred [g].

[g] Optionis. Inſtit. de lega.

Having declared by the caſes formerly propounded, whether uncertainty in reſpect of generality make void the diſpoſition or bequeſt of the Teſtator or not: Foraſmuch as there be other generall words uſuall in Teſtaments, as goods and chattels, movable and immovable, the generality whereof is apt to breed queſtion and contention; therefore, for the clearing of doubts and avoiding of ſuits, which otherwiſe might inſue about the meaning of the Teſtator by thoſe general words, I have thought good to deliver the ſeverall ſignifications of every of the ſaid words particularly, whereby it may appear what is, or is not, due to the Legatary by force of the ſaid words, or any of them.

Touching the word [*Bona*, Goods,] albeit in the explication thereof the Civilians do make mention of the Philoſophers threefold diviſion, *viz. Bona ſunt vel animi, vel corporis, vel fortunæ* *; that good things be either of the mind, or of the body, or of fortune; as vertue, health, and wealth; whereof the firſt is morall, the ſecond naturall, and the third caſual †: yet nevertheleſs, foraſmuch as this our preſent diſcourſe is not Philoſophicall, but Legall, the ſubject which we intend

* Jo. Bræchæus & Jo. Goddæus in L. bonor. de verb. ſig. ff.

† Bræchæus & Godd. in d. L. bonor.

to

to proſecute is goods of the laſt kind, which uſually men call the goods of fortune, but improperly, being in truth his good gifts who is the giver of all goodneſs, and whoſe is the earth and all that therein is ‖; and who alone ſetteth up one and pulleth down another *, making rich or poor at his good will and pleaſure †. But before we come to ſhew what is ſignified by *Goods* in a man's laſt Will and Teſtament, it is fit to conſider how it is taken both in the Civill Law, and in the Laws of this Realm.

‖ Pſal. 24. verſ. 1.
* Pſal. 75. v. 7.
† Pſal. 112. verſ. 3.

By *Goods* therefore the Civill Law doth oftentimes underſtand, not onely thoſe things whereof a man is owner, or whereof he is juſtly poſſeſſed, as Lands, Leaſes, and other perſonall or corporall goods; but alſo thoſe things which belong unto him, either corporall or incorporall, for the which he may have a lawfull action, as debts due unto him ‖ by contract or obligation.

‖ L. Bonor. 49. ff. de verb. ſig. & DD. ibid.

Secondly, by Goods the Law Civill doth ſometimes underſtand a man's whole eſtate, both actively and paſſively; ſo as his ſucceſſor univerſall, called *Hæres*, ſhall not onely injoy all his goods, but ſhall be likewiſe chargeable to pay all his debts *.

* L. Bonor. 208. ff. de verb. ſig. & DD. ib.

Thirdly, by the word Goods the ſame Law doth underſtand no more but onely a man's clear goods, his debts deducted †.

† L. ſubſignat. § bon. ff. de verb. ſign.

By the Laws of this Realm, in Deeds and contracts among the living, the word Goods is otherwiſe underſtood, comprehending ſuch things as be either with or without life, as a horſe, or a bed ‖, &c. But neither ſuch things as be of the nature of free-hold *, nor Leaſes for years †, much leſs for lives, nor things in action, as a debt upon a promiſe or obligation ‖.

‖ Kitch. verb. Cattal. fol. 34.
* D. Cowel tract. de verb. interpr. verb. Cattal. alias Chatt.
† Kitch. ubi ſupra.

‖ *Terms of Law*, ver. choſe in Action. Niſi ultra donationem bonor. accedat amplior auctoritas pro debitis recuperandis. Weſt. Symb. § 424.

The next word to be conſidered is this word [*Chattels*,] which is more obvious in the Laws of this Realm then in the Civill Law. Whereby is ſignified all goods, movable and unmovable, except ſuch as be of the nature of Free-hold or parcell thereof *.

* D. Cowell tract. de verb. interp. verb. Cattal.

Of Chattels ſome be Reall, and ſome be Perſonall. *Reall*, are Leaſes for years, and to hold at Will, and Wards ‖: *Perſonall*, are movable goods, as Money, Plate, Houſhold-ſtuff, Horſes, Kine, Corn, and ſuch like †. Howbeit ſome do hold that ready money is neither Goods nor Chattels ‖; neither Hawks nor Hounds, becauſe they be *feræ naturæ* *. The reaſon why Money is not to be accounted Goods or Chattels, the Authour of that opinion doth not expreſs; but ſome other on his behalf hath invented this witty reaſon; Becauſe, ſaith he, Money of it ſelf is not a thing of worth, but by the conſent of men, and for their eaſier Traffick, or permutation of things neceſſary for common life, it hath been reckoned amongſt other worldly goods by force of conceit, rather then conſiſting ſo indeed †.

‖ *Terms of Law*, verb. Chattels.
† Ibidem.
‖ Kitch. f. 32. verb. Cattalla.
* Kitch. ubi ſupra.

† D. Cowel de interpret. verb. verbo Cattal.

The next thing to be conſidered is, what is ſignified by [*Movables* or *Immovables*.] Concerning *Movables*; Albeit the Civill law ſometimes puts a difference betwixt *Moventia* and *Mobilia* ‖, underſtanding

‖ Alciat. & DD. in L. Moven. de ver. ſig. ff. & DD. ibid.

by *Moventia*, ſuch goods as actively and by their own accord do move themſelves, as Horſes, Oxen, Sheep, and Cattell *; and by *Mobilia*, ſuch goods as paſſively are movable, or removable, from one place to another, as apparell, pots, and pans, and ſuch like †: yet nevertheleſs, regularly, or for the moſt part, by Movables are indifferently underſtood goods both actively and paſſively movable ‖.

* Alciat. ubi ſupra. L. 2. ff. de ſupell. leg.
† Alciat. Goddæus & alii, in d. L. Movent.
‖ Text. apert. in d. L. Movent. de verb. ſign. ff.

Concerning *Immovables*; they are thoſe goods which otherwiſe be termed chattels reall; for that they do not immediately belong to the perſon, but to ſome other thing by way of dependency: as trees growing on the ground, or fruit growing on the trees, or a leaſe, or rent for term of years *; but not lands, tenements, or franck-tenement †.

* D. Cowel de verb. interp. verb. Cattal. Kitchin fo. 32.
† Kitchin ubi ſupra, verb. Cattal.

Having examined the legall ſignification of theſe words, Goods and Chattels, Movable and Immovable; it is not an unworthy leſſon, to know of what force and efficacy they be in a man's laſt Will and Teſtament.

For the better comprehenſion whereof, ſuppoſe that four ſeverall men made four ſeverall Wills, wherein the firſt did bequeath to A. B. all his goods, the ſecond did bequeath to A. B. all his chattels, the third all his movable goods, the fourth all his immovable goods. What is due to A. B. in every of theſe caſes? For particular anſwer to every particular queſtion: Firſt, where the Teſtator did give to A. B. all his Goods; in this caſe A. B. is to have the Teſtator's whole eſtate, actively and paſſively, (his lands, tenements and free-hold excepted,) being in effect his Executor, or *Hæres*, or univerſal ſucceſſour ‖: who as he is to enjoy all the deceaſed's goods and chattels, of what kind ſoever, together with the debts due to the deceaſed; ſo is he chargeable to pay all debts due by the Teſtator, ſo far as his Goods and Chattels will extend *. Neither is it to be doubted but that A. B. hath right to all the gold and money † of the deceaſed by virtue of the ſaid Legacy, as hereafter more at large.

‖ Gloſſ. in L. his verbis. ff. de hær. inſt. ac Bar. & Bald. ibid.
* L. bonorum. 200. ff. de verb. ſignif. L. ſub ſignar. § bon. eod. tit. & DD. ibidem.
† Rebuff. in L. Movent. de verb. ſign. ff. D. conſil. 472. & 381.

In the ſecond caſe, where the Teſtator did bequeath to A. B. all his Chattels; he the ſaid A. B. is to have and enjoy all the deceaſed's goods movable and immovable, together with the whole eſtate of the Teſtator deceaſed, both actively and paſſively ‖, as in the former caſe.

‖ Diction. Cattalla non minus late patere quam dictionem Bona, imo latius patere, oſtendunt Stanf. De prærogat. c. 16. & Kitch. fol. 32. verb. Cattalla.

In both which caſes, if A. B. ſhould die before he proved the deceaſed's Will, yet ſhould the Adminiſtration of his goods be committed to the next of kin of the ſaid A. B. and not to the next of kin to the Teſtator *.

* Dyer fol. 371. n. 8.

Howbeit, if the Teſtator, after he hath bequeathed all his goods, or all his chattels, or all his goods and chattels, to one man, do make another man his Executor: in this caſe the Legatary ſhall not enter into the whole eſtate of the deceaſed †; but the Executor proving the Will, is to enter unto all the goods of the deceaſed, and hath right to receive,

† Bar. in L. his ver. ff. de hær. inſtit.

or

or by ſuit to recover, all the debts due to the deceaſed ‖, and as Executor ſtandeth charged with paiment of all debts due by the deceaſed *: and if any thing remain clear after payment of the deceaſed his debts, that onely is due to the univerſall Legatary in this caſe †. But if the Teſtator do bequeath the one half of his goods to one perſon, and make another perſon his Executor, willing and appointing that all his goods ſhall be equally divided betwixt them: I do find that the two chief Juſtices of *England*, and others, did at that time when this queſtion was propounded, agree and conclude the Law in this caſe to be, that the Legatary ſhould have the one half of all the Teſtator's goods, before deduction of any debts. As for example; the Teſtator having goods to the value of an hundred pounds, and being indebted twenty pounds, doth bequeath the one half of all his goods, by his Teſtament, to his wife, to be equally divided betwixt her and A. B. his Executor. In this caſe the wife is to have fifty pounds for her moiety, without any defalcation in reſpect of the ſaid debt of twenty pounds, which is to be payed by the Executor out of the other half, having aſſets ‖.

‖ Sup. eod. l. parr. 4. § 4. n. 6. Graſ. Theſ. com. op. verb. Inſt. q. 14. n. 3.

* Lind. in c. ſtat. & c. Religioſa. de Teſt. l. 3. provinc. conſt. Cant.

† Lind. in d. c. ſtat. & in c. religioſa.

In the third caſe, where the Teſtator did bequeath to A. B. all his Movables, the Legatary may recover all his perſonall goods, both quick and dead *, which either move themſelves, as horſes, ſheep, and oxen, &c. or can be moved by another, as plate, houſhold-ſtuff, corn in the garners and barns, or in the ſheaf, &c †. But whether the Legatary, to whom the Teſtator hath bequeathed his movables, may recover corn growing on the ground at the time of the making of the Will, and death of the Teſtator, hath been a queſtion [a]: wherein it ſeemeth at the firſt view that he cannot, as well becauſe the fruits of the ground are eſteemed as acceſſory thereunto [b]; which acceſſory muſt follow the nature of the principall [c]; and therefore the ground, which is the prinpall, being unmovable, the fruit muſt be deemed likewiſe unmovable [d]: as alſo becauſe the time of making the Will (or at leaſt of the death of the Teſtator) is to be reſpected *; at which time the corn, not being cut down, or peradventure not then ripe, nor fit to be cut down, ought not to be reputed amongſt the movables [f]. Nevertheleſs, the contrary opinion hath prevailed among very many authenticall Writers [g]; yet not ſimply, but with a diſtinction [a], which is this: That of fruits ſome be Induſtriall, and ſome Naturall [b]. By *Induſtriall* I mean ſuch as be ſown in the ground by man's induſtry, in hope not to continue there ſtill, but to be ſeparated and reaped with increaſe ere long. And theſe kind of fruits the writers do reckon amongſt the movable goods [c], for that they be movable *Habitu*, or in the intention and purpoſe of the ſower [d]: and therefore the Legatary in this caſe, to whom the Teſtator hath bequeathed his Movables, may recover the corn ſtanding on the ground at the death of the Teſtator *.

‖ Dyer fol. 164. De hac qu. conſ. velim Graſſ. Theſ. com. op. § Inſt. q. 14. n. 5. & 6.

* L. Moventium. de verb. ſignif. ff. & DD. ibidem.

† Ead. L. Movent. & vide paulo infra hoc ipſo §.

[a] De hac q. vide Hicion. L. aut. in Deciſ. Rotæ Avenion. deciſ. 16. n. 39, 40. Tiraquel. de Retract. Lignag. § 1. & alios.

[b] D. Deciſ. Avenion. n. 2. Tiraq. d. § n. 42.

[c] c. Acceſſorium. de reg. jur. 6.

[d] Tiraq. ubi ſupra.

* d. deciſ. 16. n. 2. L. ſi ita. ff. de au. & argen. legat. L. uxorem. § teſt. ff. de leg. 3.

[f] L. Fruct. pendentes. ff. de rei vend. Tir. ubi ſupra.

[g] Paul. Caſtrenſ. conſil. 132. vol. 1. Socin. conſil. 60. vol. 1. Dec. conſil. 473. n. 5. Tiraquel. d. § 1. gloſſ. 7. n. 44.

[a] d. 16. Rot. Aven. n. 4. [b] De hac diſtinct. fructuum vide Molin. in conſuet. Pariſ. § 1. gloſſ. n. 50. cum ſequen. [c] D. deciſ. Aven. 16. n. 4. poſt Paul. Caſtrenſ. d. conſil. 132. quem Decius & alii ſequuntur. [d] D. deciſ. 6. & Caſtrenſ. d. conſil. 132. Tiraquell. d. § 1. gloſ. 7. n. 45. * Decius poſt Caſt. ubi ſupra. alt. conſ. 473. alter conſil. 132. vol. 1. quamvis Molineus in addic. ad conſil. Decii illud Pauli conſil. falſiſſimum eſſe affirmat; cujus ſententia, cum ſine probat. lata ſit, non magni ponderis eſſe poteſt.

By *Naturall* fruits I mean ſuch as grow of their own accord, without any great labour or coſt, as graſs, or apples [f], &c. And theſe the Legatary cannot recover as movable, unleſs they were ſeparated at the time of the Teſtator's death [g]. For till they be ſeparated, they are *Fructus pendentes*, and accompted not onely as acceſſory to the ground or trees whereupon they grow; but alſo they are reputed for part and parcell of that body whereon they grow, and whence they are nouriſhed, and conſequently of the ſame nature and condition, to wit, immovable [h].

[f] Decius d. conſil. 472. n. 5. Molin. in d. conſuet. Pariſ. § 1. gloſſ. 1. n. 50, 51.

[g] Dec. d conſ. 472. n. 5. Molin. ubi ſupra.

[h] Fruct. naturales antequam ſeparentur, non proprie fructus, ſed pars rei vere & proprie dicuntur. Ita Molin. in conſuet. Pariſ. § 1. gloſſ. 1. n. 5.

Moreover, that corn ſown and unſeparated is not to be accounted parcell of the ground of the deceaſed, but to be reckoned as parcell of his goods, is apparent by the Laws of this Realm, whereby the land, together with the trees and graſs growing thereon, ſhall deſcend to the heir, as parcell of the free-hold; but the corn growing upon the ſame ground ſhall belong to the Executor, (as parcell of his goods,) as elſewhere is more fully demonſtrated [i].

[i] Supra eodem lib. parte 3. § 6. ubi plures enumerantur caſus ex quibus liquide conſtat, quod de jure hujus regni Angliæ, frument. nondum à ſolo ſeparatum, ſed adhuc virens & creſcens, inter bona etiam mobil. computatur. Adde Perkins tit. Deviſes, & Fulbecke eodem titul. fol. 37, 38.

And hence it is that Emblements, or corn growing on the ground, ought to be preiſed and put into the Inventory of the goods of the deceaſed; but not graſs or trees, ſince they are parcell of the Free-hold, and fall to the Heir, but not to the Executor of the deceaſed [k].

[k] Vide ſupra eod. lib. parte 6. § 7. n. 3. & Perkins ubi ſupra.

Now as touching their reaſons, who do hold that fruits of the earth are to be eſteemed immovable, firſt, Becauſe the Acceſſory doth follow the nature of the principall; the anſwer to this reaſon is, That this is true in fruits naturall, but not in fruits induſtriall [l].

[l] Caſtrenſ. conſil. 132. volum. 1. Rotul. Avenion. dec. 16. Decius conſil. 472. n. 5.

And as touching the other reaſon, That the time of the Teſtament ought to be reſpected, and therefore the corn being inherent to the ground at the time when the Will was made, ought to be adjudged immovable; the anſwer is, That theſe induſtriall fruits were in the purpoſe and intention of the deceaſed ſeparable and movable, even then when the Will was firſt made [m], albeit they were not actually ſeparated or removed from the ground. Which purpoſe and intention or deſtination is ſufficient in a Teſtament to make them movable [n].

[m] Caſtr. Decius, Tiraquel. & Laurent. ubi ſupra.

[n] Quemadmodum enim fructus naturales adhuc pendentes judicantur ut fundus, vel ut ejus pars, & quid immobile; (Molin. in conſuet. Pariſ. tit. 1. § 1. & gloſſ. 1. n. 51.) ita fructus ſtatim colligendi (ſaltem induſtriales) pro collectis habentur. Tiraquel. ubi ſup. n. 44, 45. cui accedit quod deſtinatum pro perfecto, & cingendus pro cincto habetur.

Moreover, that the time of the making of the deceaſed's Will is not always to be reſpected, doth afterwards more at large appear. And ſo the former concluſion remaineth firm, that the Legatary, to whom the

the Teſtator doth deviſe his movable goods, may recover the corn ſtanding on the ground, as parcel of his movable goods [o].

To demand whether the Legatary, to whom the Teſtator did bequeath his movable goods [p], might recover the deceaſed's ready Money, might ſeem an idle queſtion, becauſe no goods are more movable then money, which is therefore termed current, (and that rightly) becauſe of the continuall ſwift motion, and running thereof from one hand to another. Yet foraſmuch as ſome do hold, that ready money is neither goods nor chattels [q]; (which opinion howſoever it may ſeem a Paradox, yet is it not utterly untrue, for that there be divers particular caſes in the Law, wherein money is not reputed as any part of the goods of the deceaſed, either movable or unmovable;) therefore the Queſtion is not ſimply idle, or unworthy to be anſwered.

But before we come to theſe particular caſes, it may be delivered for a rule, That ready money is juſtly and worthily reputed amongſt the movable goods of the deceaſed [r], and recoverable by the Legatary, to whom the movables are bequeathed [†]. The exceptions of which rule, or caſes wherein money is not accounted as goods or chattels, are theſe.

[o] Per ea quæ ſuperius dicta ſunt hoc ipſo §.

[p] Rebuff. in L. Moventium. ff. de ver. ſignif. Decius conſil. 472.

[q] Kitchin verb. Cattall. fol. 32.

[r] § Et quia parum. Authen. de Nupt. Rebuff. in d. L. Moventium. Mant. de Conject. ult. vol. lib. 9. tit. 3. n. 2. Dec. conſil. 381. & conſ. 472. Tiraquel. de Retract. Lignagier. § 1. gloſſ. 7. n. 103.

[†] Tiraquel. Retract. intereſſe, n. 8. & 9. Lignagier. § 1. gloſſ. 7. n. 103. Dec. conſil. 381. Mantic. ubi ſup. Spec. de fruct. &

The firſt caſe is, when the perſon deceaſed, by his laſt Will or Teſtament, willeth any his lands, tenements or hereditaments to be ſold: for in this caſe, by the Statutes of this Realm, the money thereof coming, or the profits of the ſaid land for any time to be taken, ſhall not be accounted as any of the goods or chattels of the perſon ſo deceaſed [t].

[t] Stat. H. 8. an. 21. c. 5. vide Bald. in L. ea demum. C. de Collac.

The ſecond caſe is, when the Teſtator hath purchaſed lands in fee, and for payment of the lands ſo purchaſed, hath treaſured and laid up certain money [v]. For there is no likelihood that the Teſtator, by that generall Legacy of his movable goods, did intend to paſs that money alſo, to the prejudice of his heir; according to that rule of law, that nothing doth paſs by generall words, where it is likely that the giver would not grant them by ſpeciall words [x].

[v] An autem pecunia ad emptionem prædiorum deſtinata, inter mobilia vel immobilia numeranda ſit, magnus eſt inter Doctores conflictus; ſed com. opinio eſt, quod numeratur inter mobil. Bar. deciſ. 219. poſt Jaſ. in L. cætera. § ſed ſi. de ſolutione prædiorum lega. 1. ff. Nec ego diverſum ſentio, ſed in caſu diverſo, viz. in pecunia parata pro emptorum, non autem emendorum.

[x] C. in general. de reg. jur. 6.

Again, ſeeing by the Statutes of this Realm the money taken for land ſold ought not to be accounted as his goods [y]; wherefore ſhould that money which is purpoſely laid up for payment of the lands bought, be accounted amongſt the deceaſed's goods [z], otherwiſe then for payment of the land purchaſed; eſpecially when the day of payment is nigh at hand, and money otherwiſe hardly to be raiſed out of the Te-

[y] Stat. H. 8. an. 21. c. 5.

[z] Arg. à contrario ſenſu, ſumpto ex ſtat. prædict.

[a] Quo caſu, inſtante nimirum neceſſitate, res deſtinata perfectioni proxima pro perfecta habetur. Zaſ. in d. L. cætera. § ſed ſi. ff. de leg. 1. n. 16. Graſſ. § legat. q. 19. n. 8. in fin.

ſtator's other goods [a]? And therefore in this caſe I do think, that the Legatary to whom the movables are bequeathed cannot recover that money, as parcell of the movable goods, in prejudice of the Heir; in whoſe favour alſo many things, which of their own nature be movable, by conſtruction or fiction of law are nevertheleſs accounted unmovable, as Hawks, and Hounds, and Deer in the Park [b], &c. There be not many other caſes wherein money is not accounted part of the movable goods [c]: which caſes excepted, in regard of the reſtleſs motion thereof, it is not onely to be accounted movable [d], but alſo to be reckoned as parcell of a man's goods, becauſe it is a good ſurety in every neceſſity *.

[b] Vide Rob. Kelleway 1. relationum, fol. 118. & Graſſ. Theſaur. com. op. § legatum. q. 19. n. 8. in fin.

[c] De quibus vide Rebuff. & Goddæum in d. L. Moven. ff. de verb. ſignif. Adde L. ſi chorus. § 1. ff. de Lega. 3. & DD. ibidem. [d] Tiraquel. de Retract. Lignagier. § 1. gloſſ. 7. n. 103. Dec. conſ. 381.

* Memorabilia Cottæ, verb. peculium.

In the fourth caſe, where the Teſtator doth bequeath to A. B. all his Goods immovable, the Legatary hath right to the Leaſes which did belong to the deceaſed [e], and alſo to all the naturall fruits thereof, as Graſs growing on the ground, and Fruit on the trees [g], and likewiſe to the Fiſhes in the pond [h], and Pigeons in the Dove-cote [i], as appurtenant to the grounds demiſed, or as parcell of the fruits of the tenement, which (if it were out of leaſe) ſhould belong to the Heir, and not to the Executor [k]. But to the corn growing on the ground, or other fruits induſtriall, the Legatary in this caſe hath not any right, for that they are accounted among the movables, as hath been proved heretofore.

[e] D. Cowell de verb. interp. verb. Cattels. Stanford de prærogat. regis, c. 16. fol. 45. L. lex. C. de adminiſt. tut. § ergo. & DD. ibidem.

[g] Molin. in conſuetud. Pariſ. § 1. gloſ. 1. n. 51, 52.

[h] Rebuff. in d. L. Moventium. Kelleway Reports fol. 118.

[i] Kelleway ubi ſup. Goddæus in d. L. Moventium. [k] Kelleway ubi ſup.

Here now another queſtion doth offer it ſelf, which may not be pretermitted, *viz.* whether Debts due to the deceaſed do paſs under the legacy of the movables, or immovables. Whereunto the anſwer is, that Debts are neither movable nor immovable [l]: and conſequently, they are neither due to the Legatary to whom the movables are deviſed; nor to the Legatary to whom the Teſtator hath bequeathed his unmovables [m]. And this is true, not onely when the Teſtator hath bequeathed all his goods movable and immovable in ſuch a place [n]; but alſo where the Legacy was deviſed without deſignation of place [o].

[l] Alciat. & Reb. in d. L. Moventium. de verb. ſignif. ff.

[m] Si leganturmobilia uni, alteri immobilia, neutri debentur nomina, inquit Rebuff. in d. L. Moventium, poſt Corn. conſil. 104.

[n] Mantic. de conject. ult. vol. lib. 9. tit. 3. n. 13. [o] Rebuff. in d. L. Moventium.

The reaſon is, becauſe Debts are a ſeverall kind from movables and immovables [p], ſeparated by a threefold difference, *viz.* in ſubſtance, in nature, and alſo in effect [q]. In ſubſtance, becauſe debts being a thing incorporall, they admit no diviſion; whereas goods, as well movable as unmovable, being corporall, are ſubject to divi-

[p] Bar. Alciat. & Reb. in L. Moventium. ff. de verb. ſignif.

[q] Rebuff. in d. L. Moventium.

diviſion [r]. In nature, becauſe goods movable and immovable may be actually poſſeſſed; whereas debts, or things in action, cannot be actually poſſeſſed †. In effect, becauſe the one, being corporall, may be preſcribed in ſhorter time then the other, being incorporall [t]. What if the Teſtator did bequeath all his goods movable and immovable whatſoever? In this caſe it ſeemeth that, by reaſon of the generality of the deviſe, the debts due to the deceaſed are thereby diſpoſed [v]. For the force and efficacy of theſe univerſal ſigns of [*All*] and [*Whatſoever*] is ſuch, as it ſtretcheth the word whereunto they are joyned to the comprehenſion of whatſoever is thereby ſignified, not onely properly, but alſo improperly [x].

[r] Inſtit. de reb. corporal. & incorporal. L. Servus. § incorporales. ff. de acquir. rerum dom.

† d. § incorporales.

[t] Nempe res mobiles triennio, immobiles decennio; jura incorporalia, 30 annorum ſpatio. Rebuff. in d. L. Moventium.

[v] Rebuff. ubi ſupra. L. ſi legatus. § 1. ff. ad

Trebel. Mantic. de conject. ult. volun. l. 9. tit. 3. n. 10. [x] Unde quicunque hæres etiam impropriè hæredem comprehendit. Et cum de quibuſcunque contractibus loquimur, etiam de abuſivis dicimus, inquit Alciatus in d. L. Moventium, n. 5.

Again, if theſe univerſall ſigns ſhould not extend the word to things improperly thereby ſignified, they ſhould be idle and ſuperfluous; which ſuperfluity is to be avoided, eſpecially in a Teſtament [y], whereln commonly leſs is written then ſpoken [z], and leſs ſpoken then was meant; partly through want of skill, and partly through want of time. Nevertheleſs, others (and, as it ſeemeth, the greater number of Writers) do hold the contrary opinion, namely, that Debts are not comprehended under the name of goods movable or immovable [a]; and that this word [*all*] or [*whatſoever*] is not of force to draw debts within the compaſs of goods movable or unmovable, no not in a Teſtament [b], becauſe it is a third kind diſtinct from either of the former [c]. Inſomuch that if there were Bonds or Specialties of thoſe debts, (which Specialties be movable;) yet, for all this, the Teſtator's debts are not underſtood to paſs by the generality of that Legacy, of all or whatſoever the Teſtator's goods, movable or immovable [d]. As for the reaſons of the former opinion, they may be thus anſwered.

[y] Mantic. de conject. ult. vol. l. 3. tit. 6. per tot.

[z] Minus ſcriptum, plus nuncupatum, multis exemplis docet Mantic. de conject. ult. vol. l. 4. tit. 3.

[a] Graf. Theſaur. com. op. § legatum. q. 19. n. 6. poſt Bar. in L. centurio. ff. de vulg. ſubſtit. n. 27. & alios quorum ſententia communiter eſt recepta.

[b] Graſſ. d. § legatum. q. 19. n. 6.

[c] Bar. Alc. & Rebuff. in d. L. Movent. ff. de verb. ſignif. [d] Graſ. d. § legatum. q. 19. n. 6. in fin.

Firſt, albeit this word [*all*] or [*whatſoever*] draw in that which is improperly ſignified; yet Debts being a diſtinct Species from movables and immovables, differing (as I ſaid before) in ſubſtance, nature, and effect, *tanquam oppoſita membra*, they cannot by any good conſtruction be contained under, or ſo much as improperly ſignified by, either the one or the other [*].

[*] Oppoſitorum ea eſt conditio, ut uno poſito, removetur alterum, & poſita una ſpecie, removentur omnes ſpecies non expreſſæ. Olden. Topic. leg. loco à ſpecie, fo. 144. & loco à differentibus, fol. 128. Neque dictio *Omnia*, adjuncta mobilibus & immobilibus, efficere poteſt ut veniant jura & actiones etiam in teſtamenta, inquit Graf. ubi ſupra.

Secondly, this word [*all*] or [*whatſoever*] is not therefore idle, becauſe it doth not extend to Debts, ſeeing it hath relation to the quantity of the Legacy, ſhewing how much the Teſtator hath bequeathed, even all:

all his goods movable or unmovable, whereof there might be question, if the Legacy were indefinite [a].

Thirdly, although it be true, that oftentimes less is written then spoken, and less spoken then intended, for want of time, or of skill, or through fear of death, or extremity of sickness: yet, for all this, no man is presumed to think that which he doth not speak [b]; or where is that *Delius* that can dive into the depth of another man's thought, when his words do not express the same [c]? For suppose he thought it, (to wit, that under immovables or movables he meant to bequeath his debts;) if he do not utter it, it is as if it had never been thought: according as it is written in the Civil Law, *In ambiguo sermone, non utrumque dicimus, sed id duntaxat quod volumus. Itaque qui aliud dicit quam vult, neque id dicit quod vox significat, quia non vult; neque id quod non vult, quia non loquitur* [d]. In a doubtfull speech we utter not a double sense, but onely that which we mean. Therefore he which speaketh one thing, and meaneth another, neither doth he utter that which the word signifieth, because he meaneth not so; neither that which he meaneth, because he speaketh it not. To draw to an end; What shall be the conclusion of this vexed question? Are Debts comprehended under the Legacy of all the Testator's goods movable and immovable, or are they not? Indeed, if we shall consider the common use of speech within this land, whereby (if I do not erre) Debts are understood to be comprehended under that general Legacy of all goods movable and unmovable *; then I rather subscribe to their opinion who do hold, that the Debts due to the deceased are thereby devised [f]; especially if the Testator bequeath as well his chattels as his goods movable and immovable, for chattels comprehend debts, as hath been afore said [g]. Now then since Debts pass under movables or immovables, here starteth up another question, What if the Testator, intending, under the name of goods movable and immovable, to bequeath his Debts also due unto him, make his Will, and thereby deviseth his movable goods to one person, and his immovable goods to another person? which of these two Legataries hath right to the Debts of the deceased?

[a] De oratione indefinita, & an ea vim universalis habeat, insignis est quæstio; de qua Covar. lib. 1. var. resol. c. 13.

[b] Nemo (inquit Baldus) præsumitur habere plus in corde quam in ore. in L. si is qui. ff. de testa.

[c] De Delio Natatore, vide Erasmum in Adagiis.

[d] Paulus in L. ambiguo. ff. de reb. dub.

* Lib. Canon. edit. An. Dom. 1603. ca. 39. & 29. Nam ibi nomina faciunt bona notabilia. Adde Stanford. prærog. c. 16.

[f] Nec in Anglia tantum, sed in aliis etiam regionibus, ex com. loquendi usu actiones contineri sub mobilibus vel immobilibus, ostendunt Tiraq. de retract. Lignag. § 1. gloss. 7. n. 18. & Old. Consil. 209. & Jo. And. ejus discipulus, & Felin. in procem. decretal. col. 3. Quibus adde Peckium Tract. de Testam. conjugum, lib. 5. ca. 30. fol. 512.

[g] Supra eod. §. n. 28. Stanford. prærog. c. 16.

The answer briefly is; That those Debts which did arise by occasion of things movable, and for the recovery whereof there lieth an action personall, belong to that person to whom the Testator did bequeath his movable goods. (a) But those Debts which did grow by occasion of something immovable, for the recovery whereof there lieth an action real, as for rents due out of Leases, or arrerages of rents due out of lands, tenements or hereditaments, they belong to that person to

(a) Bar. in L. potest. de author. tut. ff. Tiraq. de Retra. Lignagier. § 1. gloss. 7. n. 15. Grass. Thesaur. com. op. verb. legatum, q. 19. n. 5. ubi testatur hanc opinionem esse communem.

whom

whom the Teſtator did bequeath his immovable goods. (*b*) Howbeit neither of theſe two Legataries can in their own names proſecute any action againſt the parties indebted, unleſs they were Executors to the deceaſed, or his Adminiſtrators. For when the Teſtator doth appoint a third perſon to be his Executor, he onely may ſue for the debts due to the deceaſed, as repreſenting his perſon; (*c*) and having recovered and received the ſame, then may the Legataries commence ſuit againſt him in the Eccleſiaſticall Court, and there recover their ſeverall Legacies, by virtue of the Will of the deceaſed, which the Executor is bound to perform. (*d*) And in caſe the Executor do not commence ſuit againſt the parties indebted, but delay or refuſe ſo to doe; then may the Legataries convent thé Executor in the Eccleſiaſticall Court, where he ſhall be adjudged by ſentence of the Ordinary, and compelled by the cenſures of the Church, to make a letter of Atturney to either of the Legataries, for the recovery of their ſeverall debts to them bequeathed, in the name of the Executor, to their own ſeverall uſes. (*e*)

(*b*) Bar. Tiraquell. Graſſ. ubi ſupra. Aufrer. in addic. ad deciſ. Tholoſ. q. 315. in fin. cum multis aliis, quos enumerat Tiraq. in d. § 1. gloſſ. 7. n. 15.

(*c*) Supra eod. lib. part. 6. § 1. n. 4. Perkins tit. Teſtament, fo. 93. Brook Abridg. tit. Executor, n. 49. Doct. & Stud. l. 2. c. 7.

(*d*) Tract. de repub. Angl. l. 3. c. 9. ſupra eod. lib. part. 4. § 4. n. 22. in fin. c. ſtat. de teſtam. l. 3. provin. conſt. Cant.

(*e*) § Tum autem. Inſt. de Legatis. ſupra eod. lib. part. 3. § 5.

I have thought good alſo in this place to deliver what is comprehended in the generall Legacy of [*Houſhold-ſtuffe*,] and what not; the rather, for that this bequeſt of Houſhold-ſtuffe is more frequent, then well underſtood what kind of goods are comprehended therein. But before we come to the unfolding of the chiefeſt doubt, and namely, whether Plate be comprehended under Houſhold-ſtuffe, it is to be obſerved, that as there be divers words which ſignify Houſhold-ſtuffe, as *Supellex*, (*f*) *Utenſilia*, (*g*) *Maſſariciæ*, (*h*) *Arneſia*, (*i*) and ſuch like; (*k*) ſo there be divers definitions thereof extant in the body and text of the Civil Law. (*l*) For *Pomponius* defineth it after one ſort, (*m*) *Alphenus* after another, (*n*) *Tubero* after a third, (*o*) and *Florennus* after a fourth ſort. (*p*) The inveſtigation whereof is more fit for the learned, then for this plain diſcourſe, wherein I affect nothing more, then to deliver the ſimple truth in ſuch a faſhion, as is moſt agreeable to the capacity of the vulgar ſort: for whoſe inſtruction I will firſt ſhew divers particulars, whereof there is no great doubt but that they are to be reckoned amongſt Houſhold-ſtuff; then, other particulars, which without difficulty are not to be accounted amongſt Houſhold-ſtuffe. Firſt therefore, there is no doubt but that theſe particulars following are to be reckoned as part and parcell of Houſhold-ſtuffe; *viz.* *Tables*, (*q*) *Stools*, (*r*) *Foarms*, (*s*) *Chairs*, (*t*) *Carpets*, (*u*) *Hangings*, (*x*) *Beds*, (*y*)

(*f*) L. 1. de ſupell. leg. ff.

(*g*) Menoch. Tract. de præſump. l. 4. præſ. 160. n. 4. Weſenb. in tit. de ſupell. leg. ff.

(*h*) Menoch. ubi ſupra. Bar. in L. 1. ff. de ſupell. leg. Panor. conſil. 88. vol. 2. Quorum teſtimon. conſtat, hoc dictum eſſe vulgare Italorum.

(*i*) Simo de Prætis Tract. de Interpret. ult. vol. l. 4. dub. 8. n. 28.

(*k*) De quibus Weſenb. & Menoch. ubi ſupra; veluti Gerar-

da, & Mobilia domus. (*l*) Ut in L. 1. L. 2. L. 6. & L. 7. eod. tit. de ſupel. leg. ff. (*m*) Supellex (inquit Pomponius) eſt domeſticum patriſfamilias inſtrumentum, quod neque argento aurove facto, vel veſti, annumeratur. L. 1. de ſup. leg. ff. (*n*) Alphenus ſupellectilia eas res eſſe putat, quæ ad uſum comm. patriſfamilias paratæ ſunt, quæ nomen ſui generis non habent ſeparatum. L. 6. eod. tit. (*o*) Tubero hoc modo demonſtrare ſupellectilem tentat, nempe, Inſtrument. quoddam patriſfamilias, rerum ad quotidianum uſum paratarum, quod in aliquam ſpeciem non cadit. L. Labeo. de ſup. leg. ff. (*p*) i.e. Res mobiles, non animalia. L. 2. de ſupel. leg. ff. (*q*) L. ſupellectil. ff. de ſup. leg. verb. Menſæ, & verb. Trapezophoræ, i. e. Menſæ magno ornatu, quæ effictis imaginibus ſuſtinebantur; quales hodie in vetuſtis marmoribus viſuntur. Alex. ab Alex. lib. 1. dierum genial. c. 19. Menoch. de præſumpt. 160. lib. 4. n. 8. (*r*) d. L. ſupellectil. verb. ſcamna, ſubſel. &c. (*s*) L. Inſtrument. ff. de ſupel. leg. verb. Sedular. (*t*) L. de Tapetis, eod. tit. verb. Cathedralia. Menoch. ubi ſupr. n. 19. (*u*) d. L. de Tapetis, in princ. (*x*) d. L. de Tapetis. Menoch. de præſump. 160. n. 17. 19. verb. Aulæa. (*y*) d. L. ſupel. verb. Lect. etiam argentat. aurat. vel gemmat. Idem, ſi tota argentea vel aurea ſint.

Bedding, (z) *Baſons* with *Ewers* [a], *Candleſticks* [b], all ſorts of veſſels ſerving for meat and drink, being either of earth, wood, glaſs, braſs, or pewter [c], Pots, Pans, Spits, and ſuch like [d].

(z) d. L. de Tapetis, verb. Toralia. Adde quod lecto leg. debentur culcitræ, & alia lecti ornamenta. Rebuff. in L. inſtratum. de verb. ſignif. ff. Teſtatur enim, inſtructum apparatumque lectum legat. videtur. Alciat. in eand. L. [a] d. L. ſupel. verb. pelves, aquiminaria, &c. [b] L. leg. de ſupel. leg. ff. verb. Argentea candelabra. [c] d. L. ſupellectil. [d] Univerſa namque vaſa ad coquendum deputata, cum in penu non continentur, (ut in L. Inſtrumentum. ff. de penu legat.) inter ſupellectilia domus numerare crederem Panor. conſ. 88. vol. 2. n. 3. Menoch. lib. 4. Præſ. 162. n. 21. Quod ſi objiciatur, hujuſmodi vaſa eſſe inſtrumenta fundi, (L. cum de lanionis. ff. de fundo inſtruct. legat. verb. ea cabos,) & ideo non eſſe de ſupellectilium genere; (L. Labeo. ff. de ſupel. leg. in princ.) Reſpondeo, non propriam verborum ſignificationem, ſed quid Teſtator voluerit, ſcrutand. d. L. cum de lanionis. Quinimo ſupellex tanquam pars inſtructi fundi eo legato continebitur. L. quæſitum. ff. de fund. inſtruct. § ſed ſi fundus.

Secondly, without all difficulty *Apparel* *, *Books* [f], *Weapons* [g], *Tools* for Artificers [h], *Cattell* [i], *Victuals* [k], *Corn* in the Barn or Granary [l], *Wains* [m], *Carts*, *Plough-gear*, *Veſſels* [n] affixed to the free-hold, are no part of Houſhold-ſtuff. But whether *Plate* and *Coaches* are to be accounted as part of Houſhold-ſtuffe, is a queſtion wherein all Writers are not of one mind. For the deciding of which controverſy, let us ſuppoſe the caſe to be this.

* L. 1. de ſupel. leg. ff. & L. Labeo, eod. tit.
[f] L. ſupellectil. eod. tit.
[g] d. L. ſupellectil.
[h] Menoch. de præſump. 160. lib. 4. n. 33.
[i] L. 2. de ſupell. leg. ff.
[k] L. Labeo. d. tit. & gloſſ. ibidem.
[l] d. L. Labeo. & gloſſ. ibidem. [m] L. vaſa ænea. de ſup. leg. ff. Menoch. de præſump. 160. n. 29. d. L. Labeo. verb. Inſtrumenta agri aut domus. [n] d. L. vaſa ænea. & Menoch. de præſ. 160. n. 29.

The Teſtator by his laſt Will and Teſtament doth bequeath to A. B. all his Houſhold-ſtuffe. Now in this caſe whether may the Legatary recover the Teſtator's Plate and Coaches, as part and parcell of his Houſhold-ſtuffe? For the Plate, the Writers are at variance: ſome ſetting it down for law, that nothing which is made of ſilver or gold is to be accounted Houſhold-ſtuffe [o]; and ſome the contrary [p]. For reconciliation of which contrariety, we muſt uſe divers diſtinctions; whereof the firſt is of the Time, according to the ancient admonition, *Diſtinque tempora, concordabunt Scripturæ* [q]: that is, betwixt the ancient and later times. For ſuch was the ſeverity and frugality of old times, as in *diebus illis*, veſſels of gold or of ſilver, being then very rare, were not comprehended under the name of houſhold-ſtuffe [r]. But afterwards in latter times, when men began not to be contented with the ſimplicity of their Grandſires, but digging into their great Grandame's bowels for more precious metall, did furniſh their houſes with veſſels of gold and ſilver and precious ſtones, and, as it is written in the Civill Law, *Nunc ex ebore, teſtudine, atque argento, jam ex auro etiam atque gemmis ſupellectili utimur* †; upon this change of mens manners did the Law alſo begin to change, and to reckon theſe veſſels of ſilver, gold and precious ſtones, as Baſon and Ewer, Bowls, Cups, Candleſticks, *&c.* for part and parcell of houſhold-ſtuffe [t]: yet not indiſtinctly or abſolutely, but with this moderation, ſo that it were agreeable to the Teſtator's meaning, otherwiſe not [v]. That is, if the Teſtator in his lifetime did uſe to reckon them amongſt his houſhold-ſtuffe; in which caſe they are due to the Legatary by the name of houſhold-ſtuff [x]: But if the Teſtator did eſteem them as ornaments rather then utenſils, and did

[o] L. 1. de ſupel. leg. & L. 3. eod. tit.
[p] L. Labeo. eod. tit. verſ. Nunc ex ebore, &c.
[q] Glo. in d. L. ſupel. litera O.
[r] d. L. ſupellect. Vide Goddæum in L. Movent. de verb. ſign. ubi de hac quæſt. copioſe ſcripſit.
† d. L. Labeo. poſt Tuberonem. & L. legat. ff. de ſupel. leg.
[t] d. L. Labeo. & L. legat.
[v] Hoc autem diſtinctionis fœdere diverſas illas Tuberonis & Servii ſententias conciliari vult Celſus, in d. L. Labeo. de ſupel. leg. ff.
[x] Celſus in d. L. Labeo.

did uſe them for pomp or delicacy, rather then for daily or ordinary ſervice of his houſe; in this caſe they do not paſs under the Legacy of houſhold-ſtuff [y]. Or if the Teſtator did uſe to number things of another kind amongſt his houſhold-ſtuff, which without doubt are not ſo to be eſteemed, as for example, his Apparell, Books, and ſuch like [z]; then, albeit the Teſtator did intend that his apparell, or thoſe other things, ſhould paſs under the name of houſhold-ſtuffe; yet nevertheleſs the Legatary cannot recover them [a]. And albeit there be no defect in the Teſtator's meaning [b]; yet becauſe the ſame is no way uttered by words which by their own nature, or by common uſe of ſpeech, might teſtify this meaning of the Teſtator, therefore is the Legacy void, as if it had not been written or ſpoken [c]. Unleſs it were the expreſs will of the Teſtator, that the Legacy ſhould ſtand good, notwithſtanding his miſnaming thereof [d].

[y] d.L.Labeo. & Goddæus in L. Moventium.ff.de verb.ſignif.
[z] Veluti Eſcar.argentum. Servius in d. L. Labeo. Menoch. de præſum.160.n.26,27.
[a] d.L.Labeo. § verum ſi ea de quibus non dub.Goddæus in d.L. Movenr.Men. ubi ſupra. Weſenb. in tit.de ſup.leg.ff.n.3.
[b] Non enim ex opin. ſingulorum, ſed ex communi uſu, verba exaudiri debent, inquit Servius in d. L. Lab. Cujus ſententia adverſ. Tuber. obtinuit, Celſo judice.
[c] Goddæus, Menoch. & Weſenb. ubi ſupra. [d] Goddæus ubi ſupra.& vide quæ à nobis ſcripta ſunt paulo ante eod. part. § 5. n. 11.

As for the Teſtator's Coaches *, whether the Legatary to whom the houſhold-ſtuffe is bequeathed may recover the ſame, doth admit ſome doubt. But howſoever all men are not of one mind in this point [f]; yet I do rather ſubſcribe to their judgement, and yield to their authority, who do hold that Coaches are uſually numbred amongſt houſhold-ſtuffe [g].

* Rhæda dicitur genus leviculi currus in quo geſtabantur Nobiliores in villas ſuas. Spiegel. Lexic. Juris civilis, verb. Rhæda.
[f] Negat enim Alex. ab Alex. vehicula in ſupellectili contineri, ſed illa inſtrument. viator. eſſe fatetur. Cui convenit gloſſ. quædam manuſcripta in L. inſtr. de ſup. leg. ff.
[g] L.inſtr.de ſupell. leg.ff. Menoc.de præſ.l.4.præſ.160.n.16. Anto.Aug.l.primo emendationum,c.4.

§ XI. Of uncertainty in reſpect of the time or date of the Teſtament.

1. *When it is uncertain whether of the two Teſtaments is later, both are void.*
2. *The Teſtament in favour of Children is preſumed laſt.*
3. *The Teſtament* ad pias cauſas *is preſumed laſt.*
4. *The Will once proved, is not to be reproved by another of the ſame date.*
5. *A Souldier may die with two Teſtaments.*
6. *Which of theſe two Teſtaments is preſumed later, the Teſtament* ad pias cauſas, *or the Teſtament* inter Liberos.

WHere (1) two Teſtaments be found, but uncertain whether of them is the later, in this caſe neither Teſtament is good [a]; for no man can die with two Teſtaments [b]; and ſo the one Teſtament doth deſtroy the other [c].

[a] Gloſſ.in L.ult.C. de ed. Di. Adrian. tol. Clar.§ teſt.q.100.
[b] L.quærebatur.ff.de teſt.mil.
[c] Bar. in L. 1. § 1. ff. bon. poſſ. ſecundum Tabul.

Nevertheless, if the (2) one Testament be made in favour of the Testator's children, or of those who are to have the Administration of his goods, in case he had died intestate, and the other Testament in favour of others; then that Testament shall prevail which is made in favour of the Testator's children, or of them which otherwise are to have the Administration of his goods [d].

Or if (3) the one Testament be made *ad pias causas*, the other not; then that Testament *ad pias causas* is presumed last, and so to take place [*].

Or if (4) the one Testament be proved, (the other perhaps not as yet appearing,) and the Executors in possession of the Testator's goods by virtue of the Testament already proved; it is not afterwards to be reproved, nor the Executors dispossessed, by means of the other Testament of the same date [f].

Or if (5) the Testaments be military Testaments; for then perhaps they are both good, because a Souldier may die with two Testaments [g].

Where it is said, that that Testament is presumed later which is made in favour of them that are to have the benefit of the Administration of the Testator's goods, or *ad pias causas*, rather then those Testaments which are not made *ad pias causas*, nor in favour of them which are to have the Administration: what if (6) two Testaments be found, the one in favour of the Testator's children, or such as are to have the Administration of the goods of the deceased, the other made *ad pias causas*, and it doth not appear whether of them is former or later? whether is to be presumed last, and so of force? I suppose that if they which are to have the Administration of the Testator's goods, in whose favour the Testament is made, be the Testator's children, then that Testament made in their favour is to be presumed later, rather then that Testament *ad pias causas* [h]. Otherwise the Testament *ad pias causas* is to be presumed later, rather then that Testament made in favour of collaterall kinsmen [i].

It is a famous question amongst the Civilians [k], whether the time of the making of the Testament, or of the death of the Testator, is to be respected; and consequently, whether the Testator be presumed to bequeath those things onely which he had at the time of the making of his Will, or of his death [l]. For the determining of which question divers do use sundry distinctions, whereof some seem to make the matter more intricate. Wherefore pretermitting those distinctions, I have chosen a plain and easie course of deciding the controversie, by propounding a Rule with Extensions and Limitations. The Rule is this, *That the time of the Testament, and not of the Testator's death, is to be regarded* [m]. And so those goods which the Testator had at the time when he made his Will are bequeathed unto, and recoverable by, the Legatary; but not those goods which he got afterwards [n].

[d] Bar. in d. § 1. Sich. in L. ult. C. de edicto D. Adr. tol. Mantic. de conjec. ult. vol. l. 2. tit. 15. n. 17.

[*] Jas. & Sich. in L. d. ult.

[f] Bar. in d. § 1. Jas. & Sich. in d. L. ult.

[g] L. quærebatur. ff. de mil. test.

[h] Mant. de conject. ult. vol. l. 6. tit. 3. n. 43. Vide supr. 1. part. § pen. in fin. & quod ibi adnotavi ex August.

[i] Mant. ubi supr. Per. L. sancimus. C. de sacrosan. eccles.

[k] Egreg. admodum hanc esse disputationem refert Men. de præsump. l. 4. præs. 127. in princ.

[l] De hac q. vide Bar. in L. si ita legat. ff. de aur. & arg. leg. Mant. de conject. ult. vol. l. 3. tit. 11. Sim. de Præt. de interp. ult. vol. l. 4. dub. 9. fol. 178. & Menoc. d. præsump. 127. l. 4.

[m] Eandem regulam propon. Mant. & Simo de Prætis ubi supra. Per. d. L. si ita. § de aur. & argen. leg.

[n] Mantic. & Simo de Prætis ubi supra.

The

The firſt Extenſion or Ampliation of the rule is, That the ſame doth proceed not onely in reſpect of things bequeathed, but alſo in reſpect of perſons to whom any thing is deviſed [o]. As for example; the Teſtator doth bequeath an hundred pound to the children of A. B. who at the time of the making of the Will hath four children, and afterwards begetteth other four children, and ſo hath eight children at the time of the death of the Teſtator. In this caſe the hundred pound is due to thoſe four children which were alive at the time when the Will was made, but not to thoſe who were born afterwards [p].

The reaſon is, becauſe he had no thought of them which were not in *rerum natura* when he made his Will [q]. So likewiſe if the Teſtator do bequeath an hundred pound to his Pariſh-church, and after the Will made the Teſtator doth change his dwelling to another pariſh, and there dieth: in this caſe the Legacy is due to the Church where the Teſtator dwelled at the time when the Will was made [r].

[o] Simo de Præt. ubi ſupra, n. 35. poſt Bar. in L. ſi cognat. de reb. dub. ff. n. 4. Menoc. de præſump. l. 4. præſum. 127. n. 18.

[p] Bar. in d. L. ſi cognatis. ff. de reb. dub. n. 4. Alex. conſil. 170. vol. 5. n. 3.

[q] Cagnol. in L. ult. C. de pact. n. 233. Caſtr. conſil. 132. vol. 1. n. 3.

[r] Rom. in Authen. ſimil. ad L. falcid. cujus ſententiam ego quidem veram eſſe arbitror, non tamen vigore d. L. ſi cognatis; quæ lex magis adverſ. quam adſtipulatur huic opin. (ut recte monet Mantic. de conject. ult. vol. l. 3. tit. 11. n. 3.) Sed virtute d. l. ſi ita, §. de aur. & argen. leg. ff.

Secondly, this rule proceedeth and hath place, not onely in things bequeathed whereof the Teſtator hath actuall poſſeſſion, but alſo in things bequeathed which are incorporall, or things in action: and therefore if the Teſtator bequeath to A. B. all his debts, there is no more due to the Legatary by this deviſe, but onely ſuch debts as were due to the deceaſed at the time of the making of the Will, and not any debts which did ariſe to be due afterwards [†]. So likewiſe if the Teſtator do remit unto A. B. all ſuch debts as he doth owe unto the Teſtator; by this deviſe onely thoſe debts are remitted which were due to the deceaſed at the making of the Will [t]. Thirdly, this foreſaid rule is of force not onely in an indefinite or generall Legacy, (as when the Teſtator deviſeth his Books, Apparell, or Houſhold-ſtuffe,) but even then alſo when to theſe Legacies he doth adde the word *All:* inſomuch that if the Teſtator ſhould bequeath to A. B. all his Books, all his Apparel, all his Houſhold-ſtuffe, yet there is no more due to the Legatary, but onely thoſe Books, that Apparell, or that Houſhold-ſtuffe [v], which were the Teſtator's at the time when the Will was made. Fourthly, the rule aforeſaid doth ſo ſtrongly tie the Legacy to the time of the making of the Teſtament, that the Legatary to whom the Teſtator hath bequeathed any thing muſt prove that the thing bequeathed was the Teſtator's when he made his Teſtament [x]; and not the Executor, who hath the ſame in poſſeſſion [y]. Fifthly, the foreſaid rule proceedeth yet one degree farther, in conſideration of the time of the making of the Teſtament. For if the Teſtator, having ſtore of young cattell, willeth his Executor to give to A. B. two Colts of the age of two years, and after the making of his Will, liveth many years, and then dieth, having other Colts at the time of his death of the age of two years; in

[†] Cagnol. in L. ult. C. de pact. n. 231. ubi non paue. author ampliationem hanc optime firmat.

[t] Mant. de conject. ult. vol. l. 3. c. 11. n. 5. Simo de Præt. ubi ſupra, n. 36.

[v] Mant. ubi ſupr. n. 4. Socin. Jun. conſil. 99. vol. 3. per tot. Par. conſil. 21. vol. 2. n. 34. Et hoc procedit etiamſi per nomen ineum, quod præſens tempus denotat, non fuit adjectum, inquit Mant. ubi ſupra, poſt Socin. ubi ſupra.

[x] Sim. de Præt. de interp. ult. vol. l. 4. dub. 9. fol. 179. n. 36. Mant. de conject. ult. vol. (poſt Bald. Rom. Alex. & Jaſ. d. l. 3. tit. 11. n. 4. in fin.)

[y] Sim. de Præt. de interp. ult. vol. ubi ſupra, & Mant. de conject. ult. vol. d. l. 3. tit. 11. n. 4. in fin.

this caſe there is due to the Legatary two of the firſt Colts which were extant at the time of making the Will, and not of the laſt Colts at the time of his death [z]. Sixthly, If the Teſtator bequeath to A. B. a ſhare, (*viz.* a third part, or the one half) of his goods being in ſuch a place, although the Teſtator have more goods in that place at the time of his death then were there at the time when the Will was made [a]; yet the Legatary hath no right to thoſe later goods, but onely to thoſe which were there when the Will was made. And ſo I take it to be, if the Teſtator doth bequeath to A. B. all his goods which are in ſuch a place; in which Legacy onely thoſe goods are contained which were there extant when the Will was made, and not thoſe goods which were brought thither afterwards [b].

[z] L. uxori. §. teſt. ff. de leg. 3. Menoc. de præſump. l. 4. præſump. 127. n. 6. Ejuſdem farinæ eſt quod ſcriptum reliquit Old. conſil. 31. nempe quod pecunia certi generis legata, ſi poſtea variatur, debetur æſtimatio quæ fuit tempore conditi teſt. Mant. de conject. ult. vol. l. 3. tit. 11.

[a] Menoch. de præſump. l. 4. præſ. 127. n. 12. poſt Alex. conſil. 171. n. 1. vol. 6. [b] Men. de præſ. l. 4. præſ. 127. n. 29.

The firſt Limitation or reſtraint of the Rule is, when the Legacy or thing bequeathed is univerſall; for then the time of the death of the Teſtator is conſidered, and not the time when the Will was made [c]. As for example; the Teſtator doth bequeath to A. B. all his ſubſtance, or all his goods and chattels: In this caſe the Legatary hath right to thoſe things which the Teſtator left at the time of his death [d], whether they be more or leſs then they were before. Neither is this limitation contrary to the third ampliation before rehearſed, where it is ſaid, that if the Teſtator do univerſally bequeath all his books, all his apparell, or all his houſhold-ſtuff, yet notwithſtanding that univerſall bequeſt [*All*,] there is no more due to the Legatary, but onely thoſe books, that apparel or houſhold-ſtuff, which were the Teſtator's when the Will was made [*]. For howſoever theſe two Legacies may ſeem to be without difference in reſpect of the form or manner of the deviſe, both of them being univerſally framed: yet there is a great difference in reſpect of the matter or thing bequeathed [f].

[c] Mant. de conject. ult. vol. l. 13. tit. 11. n. 13. Sim. de Præt. de interp. ult. vol. l. 4. dub. 9. fo. 179. n. 41. Men. de præſ. l. 4. præſ. 127. n. 26, 27. Bar. in L. ſi ita. ff. de aur. & argent. leg. 3. n. 4.

[d] Menoc. de præſ. l. 4. præſump. 127. n. 26, 27.

[*] Supra eod. §. n. 11. poſt Mant. l. 3. c. 11. Socin. Jun. conſil. 99. vol. 3.

[f] Mant. poſt Bar. ubi ſupra.

For a man's ſubſtance, or goods, or eſtate, and ſuch like [g], they be names collective, comprehending things of divers natures in one univerſe, which doth receive increaſe and diminution [h]. But ſo are not a man's books, or apparel, or houſhold-ſtuff, for they be but *Species quædam bonorum* [i]; and conſequently no contrariety betwixt this limitation and that ampliation of the rule.

[g] Veluti peculium, reddit. Mant. de conject. ult. vol. l. 3. tit. 11. n. 13.

[h] Totum univerſ. eſt quod ex multis corporibus conſt. quæ ſive diminuantur, ſive augeantur, ſemper dicitur idem corpus. Zaſ. in L. grege. ff. de leg. n. 3. [i] Zaſ. in d. L. grege. ff. de leg. 1. n. 3.

Secondly, the rule is limited, when a thing univerſal is bequeathed, albeit the Teſtator do not adde any ſign univerſal. As for example; the Teſtator doth bequeath to A. B. his flock of ſheep, or herd of cattel [k]: for it is in effect as if he had bequeathed his whole flock of ſheep, or his whole herd of cattel [l]. In which caſe the time of the death of the Teſtator is to be reſpected, and the Legatary is to have the ſame as then they be, either increaſed or diminiſhed; inſomuch that if one onely ſheep do remain of the flock at the death of the Teſtator, yet that one is due [m], albeit one cannot make a flock [n].

[k] L. grege legat. ff. de leg. 1. cum LL. ſequen. Sim. de Præt. de interp. ult. vol. l. 4. dub. 9. n. 45. fol. 179.

[l] d. L. greg. cum LL. ſeq. L. peculium. ff. de leg. 2. & DD. in d. L. grege.

[m] L. ſi grege. ff. de Leg. 1. cad. Bar. ibid.

[n] Ibid.

Thirdly,

Thirdly, the rule is reſtrained, when ſuch a thing is bequeathed as is conſumed with uſe; for then the time of the Teſtator's death is to be conſidered [o]. As for example; the Teſtator doth bequeath to A. B. his corn; this is to be underſtood of that corn which the Teſtator left at the time of his death [p]. So likewiſe if the Teſtator do bequeath his apparel to A. E. and afterwards liveth untill that apparell be worn out, and other apparel provided in ſtead thereof; in this caſe the Legatary ſhall have the Teſtator's apparel which he left at the time of his death [q]. Neither is this limitation contrary to the former ampliation, where it is ſaid, that if the Teſtator do bequeath all his apparel to A. B. the Legatary ſhall have ſuch apparel as the Teſtator had at the time when the Will was made, and not the other apparel which was made afterwards: for that ampliation is true, when the Teſtator hath divers ſuits of apparel, whereof ſome remain which were made when the Will was made [r]; and in this caſe the Legatary can have no more but the old ſuit †. But this limitation taketh place, when the apparel is worn out and conſumed which was firſt bequeathed; in which caſe the Legatary ſhall have the new ſuit, in lieu of the former [t]; leſt otherwiſe the deceaſed's Will ſhould be utterly defeated and without effect. So likewiſe if the Teſtator having made his Will, and therein bequeathed to A.B. the corn in his barn, and afterward layeth up more corn in the ſame barn, before the other be threſhed; in this caſe the Legatary cannot recover both the old and the new corn, but muſt be contented [v] with the corn in the barn at the time when the Will was made. Or if the old corn were utterly conſumed and ſpent, yet the Legatary cannot recover a greater quantity of the new corn then the old corn did extend unto when the Will was made [x].

The fourth Limitation of the rule is, when the Teſtator doth bequeath any thing by words of the future time; as, I give to A. B. the books, apparel, or houſhold-ſtuffe, which ſhall be in my houſe, or in ſuch a place. For in this caſe, the time of the death of the Teſtator is to be reſpected [y]: and ſo the Legatary hath right not onely to ſuch books, apparel, or houſhold-ſtuffe, as the Teſtator had in his houſe, or place aforeſaid, at the time of making his Will; but alſo to thoſe other books, apparel, or houſhold-ſtuffe, extant at the time of his death, albeit they were brought thither after the Will was made. And ſo it is if the Teſtator uſe this word [*May*,] [or *Can* [z].] As if the Teſtator give to A. B. all his books, apparel and houſhold-ſtuffe, which are or can be found in ſuch a place: for in this caſe the Legatary hath right alſo to thoſe books, apparel and houſhold-ſtuffe, which be found there at the time of the Teſtator's death [a].

The fifth Limitation is, when the Legacy is conditionall. In which caſe the time when the Will was made is not to be reſpected [b]; but of the accompliſhment of the condition, or death of the Teſtator, as already hath been confirmed [c].

The ſixth Limitation is, when it is to be collected by circumſtances and conjectures, that the Teſtator did mean of the time of his death, rather then of the time when the Will was made [d]; or if it be likely that the

[o] Bar. in L. quidam. ff. de tritic. leg. Mant. de conject. ult. vol. l. 3. tit. 11. n. 16.

[p] Mantic. d. l. 3. tit. 11. n. 15.

[q] Bar. in L. ſi ita. ff. de aur. & argent. leg. n. 8. Mant. de conject. ult. vol. l. 12. tit. 2. n. 9.

[r] Menoch. de præſ. l. 4. præſ. 227. n. 29, 30. Berons q. 130. n. 5.

† Bar. in d. L. ſi ita. ff. de aur. &. arg. leg. n. 8.

[t] Bar. ubi ſupra.

[v] Maſc. de probac. concluſ. 1280. n. 33. poſt Caſtr. & Bald.

[x] Maſc. de prob. concl. 1280. n. 32, 33. Caſtr. in L. ſiſer.

[y] Mant. de conject. ult. volun. l. 3. tit. 11. n. 12. poſt Bar. in d. L. ſi ita. de aur. & arg. leg. ff. Menoc. de præſump. l. 4. præſ. 127. n. 87.

[z] Mant. ubi ſup. Menoch. de præſump. l. 4. præſ. 117. n. 21.

[a] Menoch. ubi ſupra, poſt Decium & alios in eo loco citatos.

[b] Mantic. d. tit. 11. l. 3. n. 27, 28. licet Socin. Jun. conſil. 142. vol. 2. aliud ſentire videatur.

[c] Supra eod. lib. parte 4. § 6.

[d] Mant. de conjectur. ultim. volun. l. 3. tit. 11. n. 22, 23, 24.

the Testator, if he had been asked the question, whether he meant of the time of making his Will or of his death, would have answered, that he meant of the time of his death: In this case, albeit the Legacy were given by words of the present time, yet the future time, namely, the time of the Testator's death, is to be regarded *. As for example; the Testator saith, I bequeath to A. B. all my Plate, (for this word or Pronoun possessive [*My*] hath the force of the present time f:) now suppose the Testator at the time when the Will was made, over and besides the Plate which he did then possess, (which he might justly call *Mine*, not onely in respect of his title thereunto, but also of his possession thereof,) had bought certain other Plate, which was not then delivered unto him when the Will was made: In this case, forasmuch as it is likely, that if the Testator had been asked, whether he meant that A. B. (to whom he had bequeathed his Plate) should have that Plate also which he had bought, but was not possessed of, he would have answered that he meant of that Plate also, which is very probable, the rather for that he could not but know that such Plate he had bought; therefore in this case the Legatary hath right to this bought Plate undelivered, as well as to the other g; and that by force of the conjectured meaning of the Testator, though his words did not extend thereunto h. Which meaning (as a Queen or great Commandress) doth rule and over-rule, especially in Wills and Testaments, enlarging, restraining, interpreting and directing the same in every respect i. Whereunto this may be added for a rule, then which there is not any other more apt or necessary for the interpretation of Wills and Testaments, namely, That where it is likely that the Testator, whiles he is making of his Will, if he had been asked, whether he would have thus or thus disposed, would have answered affirmatively; there the case is not to be deemed omitted, nor the thing undisposed k. Howbeit this rule of collecting the true meaning of the Testator by such supposed questions and answers, as it is very ready and profitable, if it be discreetly handled by a grave Judge with leaden feet; so on the contrary, there is not a more dangerous Doctrine to be observed, or a more erroneous guide to be followed, by him especially who is so swift of apprehension, that he needeth a bridle rather then a spur l.

If there be any other Limitations of this Rule, (as some Writers do set down moe in number m, yet they are such as (I think) may easily be reduced to one of these six before recited; or such as I suspect the soundness thereof, the laws of this Realm considered, and therefore not so necessary to be known.

* Mantic. ubi supra.

f Menoch. de præsump. l. 4. præs. 127. n. 35.

g Castr. cons. 132. vol. 1. n. 3. Mantic. de conject. ult. vol. l. 3. tit. 11. n. 22, 23, 24. Socin. Jun. consil. 98. vol. 3.

h Castr. & Mantic. ubi supra.

i Vide quæ supra à nobis scripta sunt parte prima, § 3. n. 29.

k Casum omissum pro expresso haberi, quando verisimiliter testator ita disposuisset, si interrogatus fuisset, magna authoritate probat Mantic. de conject. ult. volun. l. 3. tit. 19. n. 1, 2, 3, 4.

l Mant. ibidem, n. 5, 6, 7, &c.

m Mant. d. l. 3. tit. 11. ubi videre licet duodecim limitationes regulæ superius traditæ.

§ XII. Of

§ XII. Of an unperfect Teſtament.

1. *Two ſorts of unperfect Teſtaments.*
2. *Whether a Teſtament which is unperfect in reſpect of ſolemnity be void.*
3. *When a Teſtament unperfect in reſpect of will is void.*
4. *Two means whereby Teſtaments are ſaid to be unperfect in reſpect of will.*
5. *Whether the Teſtament be void which is unperfect by the former of theſe two means.*
6. *By the Civil Law, the Teſtament unperfect in reſpect of will is void.*
7. *Whether a Teſtament* ad pias cauſas, *being unperfect in reſpect of will, be void.*
8. *That which hath place in Teſtaments* ad pias cauſas, *hath place alſo in our Teſtaments.*
9. *Whether a Teſtament being unperfect in reſpect of will, by the ſecond means, be void or not.*
10. *What if the Teſtator, after he have declared his whole will, reſerve ſomewhat to be done at another time?*
11. *What if the Teſtator, having declared his Teſtament, do ſend for a Notary to write, and die in the mean time?*

OF imperfect (1) Teſtaments there be two ſorts: the one imperfect in reſpect of Solemnity; the other in reſpect of Will [a].

That Teſtament is ſaid to be unperfect in reſpect of Solemnity, which wanteth ſome of the legal requiſites neceſſary to the conſtitution and denomination of a ſolemn Teſtament [b]; of which we have already ſpoken [c].

That Teſtament is ſaid to be imperfect in reſpect of Will, which the Teſtator hath begun, but cannot finiſh as he would, being prevented by death, inſanity of mind, or other impediments [d].

The (2) Teſtament which is imperfect in reſpect of Solemnity is utterly void by the Civil Law *: but by the Laws Eccleſiaſtical [f], and eſpecially by the general cuſtome of this Realm [g], the Teſtament is good without any ſuch ſolemnities; ſaving that where lands, tenements and hereditaments be deviſed by Will, the ſolemnity of a writing in the life-time of the Teſtator is preciſely neceſſary, without the which the deviſe of lands, tenements and hereditaments is merely void [h].

[a] L. hac conſultiſſima. § ex imperfecto. C. de teſta. & ibi Paul. de Caſtro, Jaſ. & alii. Boer. deciſ. 240. n. 4. & 5.

[b] Sichar. & alii in d. § ex imperfecto.

[c] Supra 1. part. § 7. & part. 4. § 23.

[d] Jaſ. Sichar. & alii id d. § ex imperfecto. L. ſi is qui. de teſta. ff. L. furioſus. qui teſta. fac. poſſ. C.

* L. 1. de injuſto teſtim. ff. L. hac conſultiſſima. § ex imperfecto. C. de teſta. & DD. ibid. Minſing. in § ſed cum paulatim. Inſt. de teſta. ord. n. 12. Jul. Clar. § teſta. q. 89.

[f] c. relatum. el. 1. c. cum eſſes. de teſt. extr.

[g] Tract. de Republ. Ang. lib. 3. c. 7. Lind. in c. ſtatutum. de teſt. lib. 3. provinc. conſtit. Cant.

[h] Per ſtat. H. 8. an. 32. c. 1. ut refert D. Smith Tract. ut ſupr. Quod tamen quære.

The (3) Teſtament which is imperfect in reſpect of will is ſometimes utterly void; and ſometimes it is good, ſo far forth as it is done: which diverſity of effects doth ariſe by the diverſity of the means whereby the Teſtament is imperfect.

If we would therefore know particularly when the Teſtament is utterly void or not, which is imperfect in reſpect of Will, it behoveth us to take particular view of the ſeveral means whereby the Will of the Teſtator is made imperfect.

The (4) means whereby the Teſtament is imperfect in reſpect of Will ſeem to be two [i]. The firſt is, when the Teſtator, after he hath begun to make his Teſtament, and intending to proceed farther at that preſent, is then ſuddenly, even whiles he is making of his Teſtament, prevented by death, or inſanity of mind, or by ſome other impediment, ſo that he cannot finiſh the ſame according to his purpoſe [k].

The other means is, when the Teſtator is not hindred at that preſent time of making his Teſtament, but after he hath begun to make his Teſtament, deferreth the finiſhing or perfecting thereof untill another time, and in the mean time dieth, or otherwiſe becometh inteſtable [l].

When (5) the Teſtament is imperfect after the firſt manner, it may ſeem that the ſame is utterly void, even touching that which is already done; yea, although the Teſtator had appointed an Executor, which is the ſubſtance of the Teſtament. And there (6) is no queſtion but that by the Civil Law it is void, though it were the Teſtament of the father amongſt his children [m]. But whether it be void *jure gentium*, and conſequently by that Law which we uſe here in *England*, is a queſtion not altogether undoubtfull: and the reſolution ſeemeth to depend upon the verity of another queſtion, namely, whether a Teſtament *ad pias cauſas* being imperfect with that imperfection of Will, be good or not. For if a Teſtament *ad pias cauſas* be good, notwithſtanding ſuch imperfection; then our Teſtaments are alſo good: and if that Teſtament be not good; then ours are likewiſe naught: for theſe Teſtaments *ad pias cauſas* are ruled *ſecundum jus gentium* [n]; and ſo are ours [o].

Now (7) that a Teſtament *ad pias cauſas*, being imperfect in reſpect of Will, is utterly void, even touching that which is already done, is holden by a great many of Writers, and thoſe of great account and authority [p]; whoſe opinion is alſo teſtified to be common [q], and highly extolled [r]: their reaſon is, becauſe in this caſe here is defect of conſent, without which conſent no Teſtament is good †. There is defect (ſay they) of conſent in this caſe, becauſe Teſtators whiles they are making

[i] Maſc. Tract. de probac. verb. teſtam. concluſ. 1352. n. 70. ib. ſecundus caſus. Graſſ. Theſaur. com. opin. § teſtam. q. 19. ubi proponit tres caſus.

[k] L. ſi is qui. de teſt. ff. L. furioſum. qui teſta. fac. poſſ. C. Jaſ. & Sichard. in L. pen. de inſt. & ſub. C.

[l] Old. ad conſil. 119. Paul. de Caſtr. conſ. 75. vol. 1. & conſ. 450. vol. 2. Peckius Tract. de teſtam. conjug. l. 1. c. 18.

[m] Bar. Bald. Caſtr. & alii in L. hac conſultiſſima. § ex imperfecto. C. de teſta. quorum op. com. eſt, ut referunt Jul. Clar. § teſta. q 9. & Michael Graſſ. Theſau. com. op. § teſtam. q. 12.

[n] Panor. in Rub. de teſta. extr. n. 9. Tiraquel. de privileg. piæ cauſæ, c. 3 & c. 5. Corn. conſ. 307. Covar. in c. relatum. el. 1. n. 6. Paul. de Caſtr. conſil. 75. circa medium vol. 1. & conſil. 450. vol. 2. Graſſ. Theſaur. com. op. § teſt. q. 18. ubi dicit hanc op. com. eſſe jure can. [o] Dixi ſupra part. 1. § 9.

[p] Bald. in rep. L. 1. de ſacroſan. eccle. C. q. 6. Angel. in L. ſi is qui. de teſt. ff. Fulgoſ. conſil. 117. Auth. in c. 2. de teſta. extr. A. c. in d. L. Si is qui. Boer. deciſ. 240. Vaſq. de ſucceſſ. crea. § 22. n. 6. Pariſ. conſil. 24. vol. 3. Tho. Gram. deciſ. 62. Sichard. & Curtius Jun. in d. L. hac conſultiſſima. § ex imperfecto. [q] Jul. Clar. § teſt. q. 7. Imo magis eſt com. ait Graſſ. [r] Ab hac opinione in prax. non licere recedere, ſcripſit Ruinus conſil. 7. n. 8. vol. 3. fand. op. eſſe non modo com. ſed canonicam & veriſſimam. Laudat Vivius, Theſaur. com. op. verb. teſtam. Tandem magis communem eſſe, aſſerit Graſſ. § teſtam. q. 19. † Sichard. in d. § ex imperfecto.

of

of their Teſtaments, untill they have finiſhed the ſame, do put in, and put out, they adde, they revoke, and they alter many things already by them diſpoſed [t]. Other reaſons alſo they have, the which in my opinion are not altogether ſo forceable [v].

[t] Clar. § teſtam. q. 7.

[v] Nempe, quod teſtamentum non valet inter liberos, ergo nec favore piæ cauſæ. Sed negatur argumentum per ea quæ ſuperius dicta ſunt, prima parte, de privileg. utriuſque teſtamenti.

On the contrary, others, whoſe not onely number is more exceeding, but authority and eſtimation more excellent, are of this opinion, that where the Teſtator hath begun his Teſtament, and hath bequeathed certain Legacies *ad pias cauſas*, and intending at that preſent to proceed farther, is then ſuddenly by death or other impediment prevented or hindered, that he cannot finiſh his Teſtament; nevertheleſs, thoſe Legacies already made *ad pias cauſas* are not thereby infringed, but do continue ſtill firm and effectual, as if the Teſtator had finiſhed his Teſtament, according to his former purpoſe [x]: and this their opinion is teſtified to be more commonly received [y]. The reaſon of their opinion is, becauſe touching thoſe Legacies already given, there is no defect of natural conſent [z]. For although there be imperfection of Will in reſpect of his whole Teſtament, becauſe the Teſtator cannot abſolutely finiſh the ſame according to his purpoſe; yet in reſpect of that which is done there is no imperfection of Will [a], (the perfect is not to be hurt by the imperfect [b].) And albeit Teſtators, whiles their Wills and Teſtaments are in making, do many times adde and diminiſh, and alter divers things; yet who is able to ſay, that, concerning this or that particular Legacy already given, the Teſtator would have made any addition, diminution, or alteration? The preſumption is rather to the contrary; for perſeverance, and not mutation of Will, is preſumed [c]. Indeed, if it can be proved that the Teſtator did mean at that preſent to alter thoſe Legacies before given, ere he had finiſhed his Teſtament, and could not, being then ſuddenly prevented by death, or otherwiſe; then the former opinion hath place [d], that the diſpoſition is void; otherwiſe not *.

[x] Bar. & Imola in L. is qui. ff. de teſt. Caſtr. conſil. 456. vol. 1. Panor. in c. 1. de ſucceſſ. ab inteſtat. extr. Alex. in L. hac conſultiſſima. § ex imperfecto. C. de teſt. Are. in § fin. Inſtit. quib. mod. teſta. infir. Jaſ. conſil. 15. vol. 4. Socin. Tract. reg. & fal. reg. 300. Joh. de An. conſil. 7. Barba conſil. 42. vol. 4. Calca. conſil. 13. Dec. in c. 1. de fide inſtr. Tiraq. de privileg. piæ cauſæ, c. 7. Maſc. de probac. ver. teſt. Covar. in c. relatum. el. 1. de teſta. extr. Surdus, deciſ. 292. n. 15, 16.

[y] Tiraq. tract. de privil. piæ cauſæ, privil. 7. Maſc. de prob. verb. teſt. [z] Panor. in d. c. 1. de ſucceſſ. ab inteſtat. extra. [a] Tiraq. de privil. piæ cauſæ, privileg. 7. Dec. in c. 1. de fide inſtr. extr. Surdus, d. deciſ. 292. [b] c. utile. de reg. jur. extra. Nec obſtat ſi dicatur quod teſtamentum ſit individuum. Hoc verum jure civili, non gentium. Imol. in c. 1. de teſt. ext. n. 22. [c] L. eum qui voluntatem. ff. de probac. [d] Paul. de Caſt. in L. jubemus. de teſta. & DD. in L. pen. de inſt. & ſub. C. * Quia nemo præſumitur habere plus in corde quam in ore. Bald. in L. ſi is qui. ff. de teſt.

By (8) this now which hath been ſpoken of Teſtaments *ad pias cauſas*, we may judge whether our Teſtaments here in *England* be good or not, when they be imperfect by the firſt means; *viz.* where the Teſtator, whiles he is in making his Teſtament, after he hath appointed an Executor, or given ſome Legacies, and intending to proceed farther, is even then ſuddenly interrupted and hindred, that he cannot finiſh the ſame accordingly.

When (9) the Teſtament is imperfect by the ſecond means of imperfection of Will, that is to ſay, when the Teſtator, after he hath begun

to make his Testament, doth put off or defer the finishing thereof untill another time, and in the mean time dieth, or is otherwise letted, that he cannot make an end thereof, as he meant; howsoever by the rigour of the Civil Law the Testament in this case may seem to be void, even touching that which is already done [f]; yet by that Law which this Realm of *England* doth admit in this case, (I mean *jus gentium* [g],) concerning those things already disposed, the Testament is not void, by the reasons before alledged. For as in the former case the Legacies already given are not void, where the Testator cannot finish his Testament as he would at that time: so in this case, the Legacies before disposed, or the constitution of the Executor before made, doth not become void, where the Testator cannot finish his Testament, as he purposed at another time [h].

Much less (10) is that Testament void, where the Testator having declared his whole Will, and intending to doe no more at that present, reserveth somewhat to be done at another time, and in the mean time dieth: For even by the Civill Law in this case the Testament is perfect, notwithstanding such reservations [i]. Wherefore if the Testator, after that he hath made his Will, do say that he will adde, diminish, or alter any thing in his Will the next day, and die in the mean time, before any such additions, detractions or alterations be made; the Testament is not to be noted of imperfection by any such reservation of adding, diminishing, or altering his Testament [k]; because these things may be done by way of codicill, without the which the Testament is sufficiently perfect [l]. And especially the Testament remaineth firm and effectual, where the Testator doth over-live the time by him prescribed for such additions, diminutions, or alterations; for then he is presumed to have repented him of such additions, by not doing the same when he might [m].

Hereunto (11) it may be added, that where the Testator, having declared his whole Will before witnesses, causeth the Notary or Scribe to be called unto him, intending to have the same committed to writing, for a more sufficient proof of his Testament, and before the coming of the Notary dieth; in this case the Testament is good, and ought to prevail as a Nuncupative Testament [n]. Nevertheless, if it may be proved, that the Testator did restrain himself to the written Testament, and that it was his will and meaning, that the Testament should not be of force, unless it were written; then, the Testator dying in the mean time before it be written, the Testament shall not be allowed as a Nuncupative Testament, and so not at all [o]. But it is not presumed, by sending for a Notary, that otherwise the Testator would that his Testament should take no place, unless it were written [p]; but rather for a more ready proof of his Will [q].

[f] Paul. de Castr. consil. 450. vol. 2.

[g] Jus Gentium etiam hodie ubiq; gentium vigere, nisi ubi vel jure scripto vel consuetudine contrarium obtineat, probatur per Zas. in L. Jus civile. ff. de justic.

[h] Cum igitur eadem ratio in utroque casu militet, idem etiam jus constitui oportet. Nec casus diversitas, sed rationis identitas, inspici debet. Aymo, Gravett. consil. 150.

[i] Aret. Jas. & Sichar. in L. pen. C. de instit. & sub. Gras. Thesaur. com. op. § test. q. 12. n. 4. quam sententiam communiter receptam monstrat post Lud. Zant. Responsa pro ux. n. 302.

[k] Simo de Prætis de Interp. ult. vol. l. 1. fol. 195. Jo. de Ana. cons. 44.

[l] Sich. in L. pen. de instit. & sub. C. in fin.

[m] Alex. cons. 74. vol. 1. Old. de action. class. 5. fol. 498. Paul. de Cast. in L. jubemus. C. de Testa. Menoch. Tract. de præsump. l. 4. præsump. 15. n. 5.

[n] Alex. in L. hac consultissima. § ex imperfecto. C. de test. Graff. Thesaur. com. op. q. 20. n. 6. Mantic. de conjectur. ult. vol. l. 1. tit. 7. n. 6. ubi ostendit hanc op. esse com[illegible]

[o] Bar. post Dyn. in L. ult. ff. de jur. codic. Old. consil. 119. Castr. op. § test. q. 11. n. 1.

[p] Covar. in c. relatum. el. 1. de testa. ext. n. 17. ibi tertia conclusio. Mantic. d. c. 7. n. 6.

[q] Graff. d. § test. q. 1. 2. in fin.

consil. 75. vol. 1. & cons. 450. vol. 1. Peckius de testa. conjug. l. 1. c. 18. Graff. Thesaur. com.

§ XIII.

§ XIII. Of the defect in the Teſtator's meaning.

1. *No Teſtament good without a firm reſolution of the mind to make a Teſtament.*
2. *Words uttered raſhly or unadviſedly do not import a firm purpoſe in the Teſtator.*
3. *It is the mind, and not the words, which giveth life to the Teſtament.*
4. *What is to be conſidered to prove a firm intent of making a Teſtament.*
5. *Of the draught of a Will in writing.*
6. *If a writing be found in manner of a Will, whether is it preſumed the very Will, or but a draught thereof?*

IF the (1) Teſtator have not *animum teſtandi*, that is, *a firm reſolution or adviſed determination of making his Teſtament*, his Teſtament is void, or rather no Teſtament [a]. And therefore (2) if any man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly, nor with a firm purpoſe to make his Will, do ſay and affirm (as oftentimes it happeneth) that he will make ſuch a man his Executor, or will leave unto him all his goods, this is no Teſtament [b]: For (3) it is the mind, and not the words of the Teſtator, that giveth life to the Teſtament [c]. Which (4) mind or earneſt purpoſe ought to be proved by circumſtances [d]: as, that the Teſtator was very ſick when he ſpake theſe words *; or that he did require the witneſſes to bear witneſs thereof [f]; or that he framed and ſettled himſelf earneſtly to the making of his Teſtament [g]; or by other circumſtances of like effect [h]: wherein the Judge is to conſider the condition of the perſon ſpeaking the words, the time, the place, the occaſion, the manner of ſpeech, and in whoſe preſence [i]; and namely, whether the words were of the preſent or future time [k]. And if the words be of future time, then whether they be ſuch as do import the accompliſhment of the act, or but the beginning onely: for thoſe of the former ſort being executory, are equivalent to words of the preſent time [l]. By which circumſtances the diſcreet Judge may the better collect, whether he that uttered the words had a mind or purpoſe thereby to make his Teſtament or not [m].

[a] L. Divus. ff. de mil. teſt. § plane. Inſt. de mil. teſt.

[b] L. ult. ff. de teſt. & DD. ibi, & in L. Divus. & § plane. Hortoman. conſ. 5. vol. 2. Socin. Jun. conſil. 179. vol. 2. Par. conſil. 89. vol. 3. Hiero. Fran. in d. L. quicq. de reg. jur. ff.

[c] Mant. de conject. ult. vol. l. 2. tit. 15. in fin. L. ex feod. ff. de hær. inſt. Atque huc pertinent quæ ſuperius à me ſcripta ſunt in explic. definitionis teſt. verb. ſent. 1. par. § 3.

[d] Gloſſ. in § plane. Inſt. de teſt. mil.

* Gloſſ. in L. Divus. ff. de mil. teſt. [f] Ead. gloſ. in d. L. Divus. [g] Gloſ. in d. L. plane. [h] L. Pamphilio, § propoſitum eſt. de leg. 3. & DD. ibid. [i] Menoch. de arbitr. Jud. l. 2. centur. 5. caſ. 496. [k] Paul. de Caſtr. in L. fin. ff. de teſt. Hortom. d. conſil. 5. [l] Alciat. Ripa, & alii in L. ſervi elect. ff. de leg. 1. [m] Menoc. d. caſ. 496. ex quo abunde hauſire poteris, unde ſitim tuam extinguas.

As words (5) onely, without a conſtant purpoſe of making a Teſtament, do not make a Teſtament; ſo that writing which is prepared or deſtined for a draught or image of the Teſtator's Will onely, or for a more ready direction of the Teſtator whereby to make his Teſtament,

afterwards, is no more to be accounted a Teſtament, before it be acknowledged by the Teſtator for his Teſtament [n], then is the draught of a ſentence to be taken for a ſentence, untill it be pronounced by the Judge [o]; or the draught of an Obligation is to be accounted for an Obligation, before it be ſealed and delivered by the Obligee as his act and deed [p].

[n] L. ex ea ſcriptura. de teſt. L. fidei commiſſa. § 1. de leg. 3. ff.
[o] L. 2. & 3. de ſent. ex breviloqua recit. C. c. fin. de re jud. 6.
[p] L. contract. C. de fide inſtr.
Vantius de nullitat. viz. de null. ex defectu proceſ. &c. n. 69, 70. Bald. in d. L. fidei commiſ. § 1. Everard. conſ. 155. n. 8.

Notwithſtanding I do not hereby mean, that it is always neceſſary the Teſtator ſhould acknowledge before witneſs the Teſtament by him written to be his laſt Will and Teſtament, or that it is always neceſſary that he ſhould ſubſcribe his name, or put his ſeal thereunto; for the Teſtament written with the hand of the Teſtator may be good without any of theſe things, as heretofore I have confirmed [q].

[q] Supr. par. 4. § 25.

But now this doubt may ariſe, what (6) if a writing be found written indeed with the hand of the Teſtator in manner of a Will, wherein he hath diſpoſed his goods, and appointed an Executor, but the writing is neither ſealed with the Teſtator's ſeal, nor ſubſcribed with his name, nor by him acknowledged before witneſſes to be his laſt Will? whether ſhall this writing be accounted to be a draught of the Teſtator's Will, or the Teſtament it ſelf? I ſuppoſe that the ſolution of this queſtion reſteth in the variety of circumſtances. For if the writing be unperfect [r], for that perhaps the Teſtator doth leave off in the midſt of a ſentence †, and without any date [t], or if the ſame be written with ſtrange characters [v], or if the ſame be written in paper, and great diſtance betwixt every line, with divers emendations and corrections made betwixt the lines [x]; if alſo the ſame be found amongſt other papers of ſmall value or account [y]; by theſe circumſtances it ſeemeth rather a draught or preparation to a Teſtament, then the Teſtament it ſelf [z]. But on the contrary, if the writing be perfect or fully finiſhed, having a certain date of the day, month, and year, and be written with uſuall and accuſtomed letters in parchment, without corrections, and with ſmall diſtance betwixt the lines, and alſo found in ſome cheſt of the Teſtator among other writings of the Teſtator of great value and moment; by theſe circumſtances it ſeemeth rather to be the very Teſtament it ſelf then a draught onely [a].

[r] L. ex ea ſcriptura. de teſt. L. fidei commiſ. de leg. 3. ff.
† Bald. & Angel. in d. L. ex ea ſcriptura. Everard. conſ. 155. n. 9.
[t] Auth. quod ſine: C. de teſta. Everard. d. conſil. 155. Non tamen affirmo, neceſſarium eſſe ut tempus inſcribatur, prout jus civile in omni teſtim. etiam inter liberos exegit; ſed quia communiter apponi ſolet tempus à noſtrat. in ſuis teſt. ſcriptis, omiſſio igitur temporis (argumento à communiter accidentibus) denotat præparat. rei potius quam ipſam rem.
[v] L. quoties. § 1. ff. de hær. inſt. Bar. Bald. Ang. & alii ibidem. Non quod idcirco vitioſum ſit teſt. quia ſcriptum notis vel zypheris inuſit. maxime jure gentium attento: ſed quod deducto argumento à communiter accident. præparatio magis quam res ipſa videatur, quia perpauci vera ſua teſt. literis vel charact. inuſ. conſcrib.
[x] Paul. de Caſtr. Sich. & alii in L. contract. C. de fide inſtr. Lupus Aneg. 30.
[y] DD. in D. Auth. quod ſin. Men. præſ. 7.
[z] Ever. de conſ. 155.
[a] DD. in D. Auth. quod ſine. Ever. d. conſ. 155. Add. q. ſup. ſc. par. 4. § 25.

§ XIV.

§ XIV. Of a later Teſtament.

1. *Divers means whereby the Teſtament, being good at the firſt, is afterwards infringed.*
2. *A man may make as many Teſtaments as he liſts.*
3. *Onely the laſt Teſtament is of force.*
4. *This concluſion, that the later Teſtament doth infringe the former, diverſely extended.*
5. *The ſame concluſion diverſely reſtrained.*
6. *Of the clauſe derogatory of future Teſtaments.*
7. *Queſtions about clauſes derogatory.*
8. *Of clauſes derogatory, ſome are derogatory of the power of making Teſtaments, ſome of the will.*
9. *When the clauſe is derogatory of the power of making Teſtaments, mention or revocation thereof is not neceſſary.*
10. *When the clauſe is derogatory of the will of making Teſtaments, then it is needfull to make mention thereof.*
11. *Certain caſes wherein mention or revocation of the Teſtament derogatory is not neceſſary.*
12. *Three manner of revocations, generall, ſpeciall, and ſingular.*
13. *The force of the generall revocation.*
14. *The effect of the ſpeciall revocation.*
15. *The effect of the ſingular revocation.*
16. *The effect of the generall mention.*
17. *The effect of particular mention.*
18. *How a Teſtament may be revoked, wherein is a ſpeciall clauſe derogatory circumſcribed with certain limits.*
19. *What is chiefly to be obſerved about thoſe Teſtaments wherein be clauſes derogatory.*
20. *Clauſes derogatory of ſmall force in the Teſtaments of ſimple perſons.*
21. *What if two Teſtaments appear, but it doth not appear whether of them is later?*

IT hath been ſignified already, that (1) a Teſtament which is good and lawfull at the beginning, may afterwards become void by divers means [a]: as by the making of a later Teſtament [b]; and by revoking [c], and cancelling [d] the Teſtament made; by alteration of the Teſtator's ſtate *; by forbidding or hindering the Teſtator to make another Teſtament, or to correct the former [f]; and by divers means hereafter enſuing [g].

Concerning the firſt of theſe means, that is to ſay, the making of a later Teſtament, ſo large and ample is the liberty of making Teſtaments, that (2) a man may as oft as he will make a new Teſtament, even untill his laſt breath [h]; neither is there any cautele under the ſun

[a] Supr. eod. par. § 1.
[b] In hoc ipſo §.
[c] Infra § 15.
[d] Infra § 16.
* Infra § 17.
[f] Infra § 18.
[g] Infra §§ 19, 20. cum ſequen. uſque ad finem libri.
[h] L. ff. de adim. leg. Mant. de conject. ult. vol. l. 12. tit. 1. n. 1.

to

to prevent this liberty [i]. But no man can die with two Teſtaments [k]; and therefore (3) the laſt and neweſt is of force [l]: ſo that if there were a thouſand Teſtaments, the laſt of all is the beſt of all, and maketh void the former [m].

[i] Bar. in L. ſi mihi. § in leg. ff. de leg. 1. Old. de action. claſſ. 5. in princ. fo. 494.
[k] L. jus noſtrum. de reg. jur. ff. L. ſane. C. de teſta.
[l] § poſteriore, inſt. quib. mod. teſta. infir.
[m] Pariſ. conſil. 10. l. 3. n. 4.

This (4) concluſion, that the later doth infringe the former, is diverſely inlarged. Firſt, the later Teſtament doth infringe the former, albeit the Executor of the later do refuſe the Executorſhip, or die, either during the life of the Teſtator, or after his death [n]: for it is ſufficient that once he might have been made Executor [o]. Secondly, the later Teſtament doth infringe the former, albeit the Prince or Emperour himſelf were appointed Executor of the former [p]. Thirdly, the later Teſtament doth make fruſtrate the former, albeit the former were a written Teſtament, and the later but a nuncupative Teſtament [q]. Fourthly, the later doth infringe the former, albeit there be no mention in the ſecond Teſtament of revoking the former [r]. Fifthly, the later Teſtament doth revoke the former, albeit in the former there be a clauſe derogatory of Wills and Teſtaments afterwards to be made †. But then, whether it be neceſſary that in the later Teſtament there be mention or revocation of that former Teſtament, or of the clauſe derogatory, is hereafter declared [t]. Sixthly, the later Teſtament doth make void the former, albeit there be twenty witneſſes of the former, and but two of the later [v]. Seventhly, the later Teſtament doth take away the former, albeit in the former Teſtament the Executor is appointed ſimply or without condition, and in the later conditionally, and the ſame condition alſo violated [x]; ſo that the condition be of ſomething then to come at the time when the condition was made. But if the Executor of the later Teſtament be made upon ſome condition then preſent, or paſt, the condition not exiſting, the former Teſtament is not revoked [y]. Eighthly, the later Teſtament doth make void the former, albeit the Teſtator have ſworn not to revoke the ſame [z], the oath being alſo revoked together with the Teſtament [a].

[n] d. § poſteriore. inſtit. quib. mod. teſta. infir. Maſc. tract. de prob. concl. 1282. n. 2.
[o] Eod. § poſteriore.
[p] L. ſi quis. C. qui teſta. fac. poſſ.
[q] Vaſq. de ſucceſſ. reſoluc. l. 1. § 1. n. 26, 27. Perk. tit. teſt. fo. 92. Dyer fo. 310.
[r] Minſing. & Vigl. in d. § poſteriore.
† Bar. in L. ſi mihi & tibi. § in legatis. ff. de leg.
[t] Infra eod. §. n. 7, 8, 9, &c.
[v] Covar. in Rub. de teſt. extra. part. 2. in prin. Vaſq. de ſucc. reſol. l. 1. § 1.
[x] d. § poſteriore. Inſt. quib. mod. teſt. inf.
[y] Minſin. in d. § poſt. n. 6. adde Hier. Pant. l. 2. quæſt. controv. q. 10.
[z] Covar. in Rub. de teſt. extr. par. 2. n. 19.
[a] Jul. Clar. § teſt. q. 87. & hoc, inquit, eſt valde notandum.

The Reſtrictions (5) of this former Concluſion are theſe. Firſt, the later Teſtament doth not make void the former, when the later is unperfect in reſpect of the Teſtator's will [b], and not in reſpect of ſolemnity [c]. Secondly, the later Teſtament doth not make void the former, when it is vehemently ſuſpected that the Teſtator was compelled to make the later Teſtament by fear or violence [d]. Thirdly, the later Teſtament doth not make void the former, when it is ſuſpected that

[b] § ex eo. inſt. quib. mod. teſt. infir. L. ſancimus. c. de teſta.
[c] Supra hoc ipſo §. Ampliac. 3. & 6.
[d] Simo. de Præt. de interp. ult. vol. l. 4. fo. 226. n. 49. Sed an ſufficiat prob. per unic. teſtem, vide ibidem.

the

the Teſtator was induced to make the later by fraud or deceit *. Fourthly, the later Teſtament doth not take away the former, the later being made at the interrogation or ſuggeſtion of ſome other perſon f; eſpecially when the Teſtator is very ſick, and in perill of death g: for then it doth not take away the former made by the proper motion of the Teſtator h, unleſs it appear plainly of the expreſs will of the Teſtator to revoke the former i; or unleſs the Teſtator himſelf did dictate the Teſtament k; or unleſs the later Teſtament be in favour of the Teſtator's children, or others who were to have the Adminiſtration of his goods if he died inteſtate l. Fifthly, where the Teſtator hath made two Teſtaments, a former and a later, both being written, and the ſame Teſtator afterwards lying ſick upon his death-bed, ſome neighbours of his preſenting to the Teſtator both the Teſtaments, willing him to deliver to them which of theſe Teſtaments he will ſhall ſtand for his laſt Will, if the Teſtator, being of perfect mind and memory, ſhall deliver to them the former Teſtament; in this caſe the Teſtament ſo delivered ſhall be the Teſtator's laſt Will, albeit it were firſt made m. Sixthly, the ſecond Teſtament doth not revoke the former, when the ſecond Teſtament doth not in any wiſe diſſent from the former, but agreeth with the ſame in all points; eſpecially if the later were made very ſhortly after the former, for then they both ſeem but one Teſtament in divers writings n. Seventhly, the former Teſtament is not revoked, when in the later Will there be no Executors named; for then the later is but a codicill or addition to the former Teſtament, wherein Executors be named o. Eighthly, the former Teſtament is not revoked by the later, where the Teſtator doth take an oath not to revoke the former, unleſs there be expreſs mention of the ſame Teſtament with the oath p. Ninthly, the later Teſtament doth not take away the former, when it is made in heat of anger and diſpleaſure conceived by the Teſtator againſt the Executor of the firſt Teſtament, whereas afterwards they be reconciled and joyned in amity as before q. Tenthly, the (6) former Teſtament, wherein is a clauſe derogatory of Wills and Teſtaments afterwards to be made, (as if the Teſtator ſay, *Whatſoever Teſtament I ſhall hereafter make, I will that the ſame be of no force*, &c.) is not always infringed by the later Teſtament, unleſs there be ſufficient mention or revocation of the former Teſtament or clauſe derogatory r.

If you demand in what (7) caſes mention or revocation is to be made of the former Teſtament having a clauſe derogatory, and in what manner this mention or revocation ought to be made, and is ſufficient for the revoking of the former Teſtament with the clauſe derogatory: ſurely this queſtion, eſpecially concerning the manner of mention or revocation to be made in the ſecond Teſtament, is very difficult, and ſuch as in the anſwering whereof the Writers do fight amongſt themſelves mightily, and do contradict one another very ſtrongly †, ſo that

* Sim. de Præt. ubi ſup. & ſup. ead. par. § 3.

f Zaſ. conſ. 3. vol. 1. n. 41. Aymo conſ. 10. n. 13. Apoſtil. ad Ripam in L. 1. § ſi quis ita. ff. de ver. ob. n. 9. ubi dic. hanc op. eſſe com. & ſupr. ead. part. § 4.

g Soc. Jun. conſ. 148. vol. 2. n. 15.

h Vide quæ ſcripſi ſup. part. 2. § 26.

i Gabriel l. 4. com. concluſ. tit. de teſta. concluſ. 2. n. 9. poſt Ruin. conſ. 12. n. 11. vol. 2. Menoc. l. 4. præſump. 8.

k Gabriel ib. n. 21. in fin. Menoc. ubi ſupr.

l Soc. Jun. conſ. 144. n. 5. vol. 2. Dec. conſ. 489. Reuſuerus tra. de teſt. par. 6. c. 20. n. 25.

m Perk. tit. teſt. fo. 92.

n Vigl. in d. § poſt. Inſt. quibus modis teſt. infir.

o Inſt. de codic. vide ſupra part. 1. § 5.

p Vaſq. de ſucceſſ. reſoluc. l. 1. § 1. n. 32. Graſ. Theſaur. com. op. § teſt. q. 86. Jul. Clar. § teſt. q. 64. n. 5. Vide Menoc. de præſ. l. 4. præſ. 166. n. 63.

q L. quicquid. de reg. jur. ff. Mant. de conject. ult. vol. l. 12. tit. 1. n. 25.

r Gloſ. in L. ſi mihi & tibi. § in lega. ff. de leg. 1. quam commun. receptam dicit Jaſ. in L. Horatius. ff. de lib. & poſthu.

† Ut patet per Cov. in Rub. de teſt. extra. per Mant. de conject. part. 2. & per Jul. Clar. § teſt. q. 99. & per Graſſ. Theſaur. com. op. § teſt. q. 85. & ult. vol. l. 12. tit. 8.

the victory is very doubtfull, and very hard it is to know whether opinion is truer, or more commonly received. Others, labouring to reconcile these contradictions, and to pacifie these contentions, have waded so for fine and dainty distinctions, that they seem to swim up and down, and to float hither and thither, I know not whither, in a deep and bottomless sea of intricate and confused divisions [t]: so that if a man would adventure to follow them to the end of their voiage, he might well doubt whether ever he should obtain any haven or safe landing. Wherefore for mine own part, I thought to wade no farther from the shoar then I should find fast footing, and where I might be within the Reader's reach.

[t] Bar. in L. si quis, in prin. de leg. 3. Mich. Grass. § de test. q. 89. DD. in L. si mihi & tibi. § in leg. ff. de leg. 1.

Concerning the question therefore, first of all, we are to understand, (8) that of clauses derogatory there be two sorts; the one derogatory of the Power of making Testaments, the other derogatory of the Will of making Testaments [v]. Example of the first is, when the Testator useth these or the like words, *I do from henceforth renounce the power of making any other Testament*: or thus, *I will that hereafter I have no more liberty or authority to make moe Wills or Testaments*, &c. Example of the second, when the Testator useth these or the like words, *If I make any Testament hereafter, I will that the same be of no force*: or thus, *If I make any Testament hereafter, except therein I write the Lord's Prayer, my mind and will is that the same be void and of none effect* [x]. The use of this distinction or difference betwixt clauses derogatory of power and of will is this.

[v] Clar. Graf. Covar. ubi supra. DD. in d. § in legatis.

[x] DD. in d. § in leg. Covar. in d. Rub. Clar. & Graf. ubi supr.

If (9) the clause be derogatory of the Power or Liberty of making of Testaments, and afterwards the Testator makes another Testament, it is not needfull therein to make any mention or revocation of the former Testament, or clause derogatory therein contained [y]; for the former is taken away by the second, as if there had not been any such clause derogatory therein at all. The reason is, because the clause derogatory of power of making Testaments is utterly void in Law, nor can a man renounce the power or liberty of making Testaments [z]; neither is there any cautel under heaven to prevent this liberty [a], which also endureth whiles any life endureth [b], as hath been afore said.

[y] Bar. in L. si quis, in prin. de leg. 3. Jaf. in d. § in leg. Clar. § test. q. 99. n. 2. Graf. § test. q. 89. n. 3.

[z] Bar. d. L. si quis. n. 4. Clar. & Graf. ubi supr.

[a] Bar. in d. § in leg. Old. de action. class. 5. in prin. fo. 497. Mant. de conject. ult. vol. l. 12. tit. 1. n. 1.

[b] L. 4. ff. de adimen. legatis.

If (10) the clause be derogatory of the Testator's Will, then it is necessary that in the later Testament there be mention or revocation of the Testament with the clause derogatory, otherwise the former Testament is still in force [c]. The reason is, because there is presumed a defect of the Testator's will in the second Testament, and that his meaning is not to have the former revoked, without making mention of the former derogatory Testament [d].

[c] Bar. in L. si quis. de leg. 3. Clar. § testa. q. 99. Graff. § testa. q. 89.

[d] Covar. in d. Rub. de test. extra. part. 2. Clar. & Graff. ubi supr. Mantic. de conject. ult. vol. l. 12. tit. 8. Paris. consil. 10. vol. 3. n. 9. 24. &c.

Never-

Nevertheleſs (11) it is not perpetually true, that the Teſtament wherein is a clauſe derogatory of the Teſtator's Will is not infringed by the later Teſtament, wherein is no mention or revocation of the former Teſtament derogatory; for it faileth in divers caſes.

The firſt caſe is, when it may be proved by other conjectures that it was the Teſtator's meaning, that the former Teſtament ſhould be revoked *.

* Covar. in d. Rub. 2. part. n. 19. verſ. quar. concluſ. Pariſ. conſil. 10. vol. 3. n. 21. Graſſ. d. q. 89. n. 6. Clar. d. q. 99. n. 8. Mantic. de conject. ult. vol. l. 12. tit. 8. n. 13. Maſcard. de probac. concluſ. 1282. n. 43.

Another caſe is, when there be ten years expired from the time of the firſt Teſtament [f].

The third caſe is, when the Teſtator doth with an oath confirm the later Teſtament [g].

The fourth caſe is, when the ſecond Teſtament is made in favour of the Teſtator's children [h], or ſome other perſon entirely beloved of the Teſtator [i].

[f] Bald. in L. ſancimus. C. de teſta. n. 6. Graſ. d. q. 89. n. 10. Clar. d. q. 99. n. 19.

[g] Bald. in d. L. ſancimus, in fin. Graſſ. d. q. 89. n. 8. Clar. d. q. 99. n. 10.

[h] L. ult. C. de Curator. furioſ. Graſ. d. q. 89. n. 9. Mantic. d. tit. 8. n. 27. C. de teſta. lim. 6.

[i] Jaſ. in d. L. ſancimus.

The fifth caſe is, when the Executor named in the former Teſtament, after the making thereof, doth grievouſly offend the Teſtator [k]. For in this caſe there is great likelihood of the alteration of the Teſtator's mind [l].

[k] Jaſ. in d. L. ſancimus. lim. 2.

[l] Menoc. de præſ. l. 4. præſ. 166. n. 37.

The ſixth caſe (grounded upon the ſame reaſon of likelihood of alteration of the Teſtator's mind) is, when the child being made Executor in the firſt Will, whereby alſo the Teſtator doth bequeath unto him all his goods, dieth before his father [m].

[m] Menoch. ibid. Soc. Jun. conſil. 124. n. 52. vol. 1.

The ſeventh caſe is, when the ſecond Teſtament is made to godly and charitable uſes [n].

[n] Menoch. de præſ. 166. n. 40. Oldrad. conſil. 129.

For the other queſtion, (*viz.* What manner of revocation is to be made in the ſecond Teſtament, that it may ſuffice to revoke the former Teſtament, wherein is a clauſe derogatory of the Will of the Teſtator,) we muſt note (12) that there be three ſorts of Revocations; one generall, another ſpeciall, the third ſingular or individuall [o]. *Generall*, when the Teſtator in his later Teſtament uſeth theſe or the like words, *I will that this Teſtament ſhall ſtand, notwithſtanding any other Will or Teſtament by me heretofore made*: or thus, *I revoke and make void all former Wills and Teſtaments*, &c. *Speciall*, when the Teſtator hath theſe or the like terms, *I do hereby revoke all former Teſtaments, notwithſtanding any clauſe derogatory in the ſame. Singular*, wherein the Teſtator ſaith, *I make my laſt Will and Teſtament, notwithſtanding that clauſe derogatory of my former Will, that I would not have that Teſtament revoked, unleſs I ſhould inſert in this Teſtament the Lord's Prayer*: or thus, *Notwithſtanding that clauſe derogatory in my former Will, whereby I would that no Will or Teſtament afterward to be made ſhould prevail, albeit it ſhould ſpecially derogate from the former*: or thus, *Notwithſtanding that*

[o] Graſſ. Theſ. com. op. § teſta. q. 89. n. 4. Clar. § teſt. q. 99. n. 7. Mant. de conject. ult. vol. l. 12. tit. 8. n. 6.

Will where I made ſuch a perſon my Executor: or thus, *Notwithſtanding that Will which I made in ſuch a place, at ſuch a time, and before ſuch witneſſes*, &c [m]. Theſe diſtinctions obſerved, I make theſe concluſions.

[m] Bar. in L. ſi quis, in prin. ff. de leg. 3. Covar. in Rub. de teſt. extra. part. 2. n. 19. Clar. § teſta. q. 99. Graſſ. § teſtam. q. 89. Mant. de conject. ult. vol. l. 12. tit. 8.

The firſt concluſion is, That (13) if in the later Teſtament there be a generall revocation, as, *Notwithſtanding all former Teſtaments*, &c. the former Teſtament, wherein is a clauſe derogatory of the Teſtator's will, is not thereby taken away [n], albeit there be but one former Teſtament [o].

[n] Bar. in d. L. ſi quis. Socin. Jun. in eand. L. n. 24. Graſſ. Theſaur.

[o] com. op. § teſt. & hæc opinio (inquit ille) eſt vera. q. 89. n. 4. [*] Jaſ. in L. ſancimus. C. de teſt. quæ ſententia communis eſt, teſte Graſ. d. q. 89. n. 5. contrarium Bar. in d. L. ſi quis. Cujus opinio communiter reprehenditur, ut aſſerit Tobias Nonius conſil. 26. col. 2. & ſecundum communem opinionem eſſe pronunciandum à Judice, monet Tiraq. de leg. connub. gloſ. 7. n. 131. Clar. d. q. 99. n. 3. affirmans quod in lib. ſuo aut Bar. verba ſunt corrupta, aut non fideliter à Doctoribus recitata. Tu igitur conſulas librum proprium.

The ſecond concluſion is, That (14) if in the ſecond Teſtament there be a ſpeciall revocation, as, *Notwithſtanding any Teſtaments with their clauſes derogatory*, &c. the former Teſtament with the clauſes derogatory of the Teſtator's Will is thereby taken away [p].

[p] Dy. in c. quod ſemel. de reg. jur. 6. Alc. d. L. ſancimus. Clar. § teſta. q. 99. n. 4. & per eum cenſetur communis opinio.

The third concluſion is, That (15) if in the ſecond Teſtament there be a ſingular revocation of the former Teſtament, as, *Notwithſtanding ſuch a Teſtament made before ſuch a Notary*, &c. the ſame former Teſtament having therein a generall clauſe derogatory is ſufficiently revoked, although in the ſecond Teſtament there be no mention of the clauſe derogatory in the former Teſtament [q].

[q] Bar. in d. L. ſi quis. n. 8. Covar. in d. Rub. de teſtam. extr. n. 19. verſic. cert. concluſ. qui ibi atteſtatur hanc op. eſſe & com. & veriorem.

The fourth concluſion is this, That (16) if in the former Teſtament there be a ſpeciall clauſe derogatory, the ſame is taken away by the ſecond, wherein is generall mention made of the former Teſtament, and of the clauſe derogatory [r].

[r] Bar. in d. L. ſi quis. col. 3. DD. in d. L. ſancimus. Covar. in d. Rub. de teſt. n. 19. verſic. cert. concluſio. ubi dicit hanc op. eſſe comm.

The fifth concluſion is, That (17) if in the former Teſtament there be a ſpeciall derogatory clauſe, the ſame is not taken away by the ſecond Teſtament, wherein is particular mention of the ſame Teſtament without mention of the clauſe derogatory †.

† Paul. de Caſt. conſil. 206. vol. 1. Covar. in d. Rub. n. 19. verb. primum quæſtione.

The ſixth concluſion ſhall be, That (18) if in the former Teſtament there be a ſpeciall clauſe derogatory, circumſcribed with certain limits, for example, *I will that this Teſtament ſhall ſtand, notwithſtanding any other to be made hereafter, unleſs in the ſame I ſhall write, or cauſe to be*

to be written, the Lord's Prayer, &c. the same former Testament may be taken away by a second, albeit the Lord's Prayer be not written in the same [t]: but then it is behovefull that in the second Testament there be mention not onely of the Testament, but also of the clause derogatory; as, *I will that this later Testament shall stand, notwithstanding any former Testament by me made, containing whatsoever words or clause derogatory*; which done, the former Testament is taken away [v].

[t] Bar. in d. si quis. Covar. in d. Rub. n. 19. verb. secundum. Apostil. ad Bar. in d. L. sancimus. C. de testa. Bald. consil. 178. vol. 4.

[v] Bar. in d. L. si quis. Paul. de Castr. consil. 284. vol. 1. Covar. in Rub. de test. extr. par. 2. n. 19. Mant. de conject. ult. vol. lib. 12. tit. 8. n. 10. Atque hanc opinionem communem laudat Covar. Sal. Dy. & aliis refragantibus.

Other conclusions [x] I might adde, but I thought (19) good to deliver this one for all, the same in my opinion being more worthy to be remembred; which conclusion is this, That it behoveth the Judge, where he findeth such clauses derogatory in any Testament, to consider the persons of the Testators, namely, whether they be such persons as do understand the force and effect of these clauses derogatory and revocatory, yea or nay; and to examine the occasions of inserting the same clauses: especially this is to be considered, whether these clauses be added by the proper motion of the Testator himself, or at the instigation and perswasion of some other, as the Executor, the Legatary, the Notary [y], &c. For if the Testator do understand the effect of such clauses derogatory, and did insert the same wittingly and willingly of his own accord, it is presumed that he did so, lest peradventure afterwards he might be solicited and induced, by the instigation and importunity of his kinsfolks, or the molestation of some other, receiving small benefit by the Testament, and hoping to gain more by the alteration or revocation thereof, to change or revoke the same, contrary to his former settled purpose and firm resolution. In which case, if at any time after the Testator make a new Testament, the former is not easily revoked [z]; unless in the second he do make mention of revocation of the former Testament, with the clause derogatory [a], in cases where revocation is necessary, as in the former conclusions is prescribed: otherwise, the said form not observed, it is to be presumed, that it is not the Testator's meaning to infringe and frustrate his former Testament, made with such constant resolution, and precise caution [b]. But on the contrary, if (20) the Testator were but a simple person, not understanding the effect of such derogatory or revocatory clauses, and the rather, if the same clauses were inserted in the former Testament by the Notary, at the petition or by the direction of such as were benefited by the same Testament, or some of their friends, being loth to have the same altered or revoked; then, howsoever the former Testament be corroborated with cunning or precise clauses, of inserting the Lord's Prayer in the second Testament, or of not revoking the former Testament, although in the second he should specially revoke the same; all these cunning clauses and curious cautions notwithstanding, the former Testament may be the more easily revoked, without any

[x] Videant Justinianistæ Mant. de conject. ult. vol. lib. 12. tit. 8. & Covar. in d. Rub. de testa. part. 2. n. 19.

[y] Simo de Prætis de interp. ult. vol. l. 4. fol. 227. n. 60, &c.

[z] Paris. consil. 10. l. 3. n. 10, 11, &c.

[a] Simo de Prætis de interp. ult. vol. l. 4. fol. 227. n. 61, &c.

[b] Simo de Prætis ubi supra.

ſuch preciſe obſervation of any ſpeciall revocation above deſcribed [c].

[c] Idem Simo de Prætis loco ſuperius allegato, ubi locupletiſſime de hac re. Cui adjicias Didac. Covar. in Rub. de teſta. extr. n. 19. verb. decimo tertio. Mantic. de conject. ult. vol. l. 12. tit. 8. n. 15. Barb. conſ. 72. vol. 3. Pariſ. conſ. 10. vol. 3. n. 21, &c.

Thus we have ſeen in what caſes the former Teſtament is infringed or not infringed by the laſt Teſtament. If any do here demand of me, What (21) if two ſeveral Teſtaments do appear to be made by one perſon, but it doth not appear which is former or later? which of theſe ſhall prevail? This queſtion is ſatisfied a little before [d]; thither I refer the Reader.

[d] Supra ead. part. § 11. & ſup. 1. par. § 16. n. 7.

§ XV. Of revoking the Teſtament made.

1. *Lawfull for every man to revoke his Teſtament, and to die inteſtate.*
2. *Revocation of a man's Teſtament is not preſumed.*
3. *Divers extenſions of the former concluſion.*
4. *Divers limitations of the ſame concluſion.*
5. *Whether a bare revocation do overthrow the Teſtament.*

ANother of thoſe means whereby the Teſtament, which was good at the beginning, is afterwards made void, is Revocation of the ſame Teſtament. For (1) as it is lawfull for every Teſtator to adde and diminiſh to and from his Teſtament, and to alter the ſame: ſo is it likewiſe lawfull for every perſon having made his Teſtament, to revoke the ſame, and to die inteſtate [a].

[a] Bald. in L. ſancimus. C. de teſt. Mant. de conject. ult. vol. l. 2. tit. 15.

But (2) no man is preſumed to have revoked his Teſtament once made, unleſs it be proved [b]. Inſomuch (3) that if a man do live by the ſpace of forty years after he have made his Teſtament, yet is not the Teſtament preſumed to be revoked by the courſe of ſo long time [c]. And albeit during the ſame time his wealth and ſubſtance do greatly increaſe, yet is not the Teſtament preſumed to be revoked [d]. And albeit the Teſtament be in prejudice of ſuch as otherwiſe were to have the Adminiſtration of the goods of the deceaſed; yet all thoſe things concurring, *viz.* the long time, the increaſe of the Teſtator's wealth, and the prejudice of ſuch as are to have the Adminiſtration of the Teſtator's goods, the Teſtament is not preſumed to be revoked *. And albeit the Teſtament be made in time of ſickneſs and perill of death, when the Teſtator doth not hope for life, and afterwards the Teſtator recover his health; yet is not the Teſtament revoked by ſuch recovery [f]. Or albeit the Teſtator make his Teſtament by reaſon of ſome great journey, yet it is not revoked by the return of the Teſtator [g]. And albeit the Teſtator, after the making of the Teſtament, have a child

[b] L. eum qui voluntatem. ff. de probac. Maſc. Tract. de prob. concl. 1280. qui variis & ampliac. & limitac. hanc concluſ. ornavit.

[c] Paul. de Caſtr. Alex. & Jaſ. in d. ſancimus. C. de teſt. Quære tamen Bart. Sing. 183. & Mantic. l. 6. tit. 3. n. 46. etiamſi prius fuerit teſtamentum ad pias cauſas.

[d] Alex. & Jaſ. in d. L. ſancimus.

* Paul. de Caſt. Jaſ. & Alex. ubi ſupra.

[f] Alex. & Jaſ. in d. L. ſancimus. Maſc. Tract. de prob. concl. 1280. n. 17, 18.

[g] Dyn. in. L. poteſt. de hæred. inſt. ff. repertorium Bertach. verb. teſta. revocatur, n. 48.

born

born unto him, I ſuppoſe that the Teſtament is not preſumed thereby to be revoked [h]; eſpecially if the Teſtator did live a long time after the birth of the child, and might have revoked the Teſtament, and did not [i].

[h] Hoc ita ob defectum patriæ poteſtatis. L. quod dicitur. ff. de l. & poſthu.

[i] Mant. de conject. ult. vol. lib. 12. tit. 2. in fin. quamvis inſpecta juris civilis diſpoſitione, contraria opinio approbatur. Graſſ. § legat. q. 67. Ripa in L. ſi unquam. C. de don. 42. Maſcar. de probac. concluſ. 1280. n. 153. quæ concluſio ampliatur & limitatur per Prat. Tract. reg. & fal. l. 2. reg. 466. fol. (mihi) 16. verb. legato.

On the (4) contrary, the Teſtament is ſometimes preſumed to be revoked, and the Will of the Teſtator altered. One caſe is, when he that is appointed Executor or Legatary, after the making of the Teſtament, doth become enemy to the Teſtator, or doth him ſome great injury [k]. Another caſe is, when the Teſtator, in heat of anger or diſpleaſure conceived without juſt cauſe againſt his ſon, or other perſons to whom the Adminiſtration of his goods were to be committed, if he had died inteſtate, maketh his Teſtament in favour of others, and afterwards (the heat of his diſpleaſure being extinguiſhed) they be reconciled: for by this reconciliation the Teſtament is preſumed to be revoked [l]. The third caſe is, when the Teſtator hath begun to make his Teſtament, but is letted or hindred by the Executor, that he cannot proceed as he would to the finiſhing of the Teſtament, or farther diſpoſing of other Legacies: for in this caſe the Will of the Teſtator is preſumed to be revoked [m], concerning any benefit which the perſon ſo hindering the Teſtator otherwiſe ought to have reaped [n]. The fourth caſe is, when the Teſtator being extremely ſick, and afraid to die, doth bequeath ſome Legacy *ad pias cauſas*, and after doth recover his health: for there the Legacy is alſo preſumed to be revoked [o]. It may ſeem ſtrange, that Legacies left to good and godly uſes ſhould be revoked, rather then other prophane Legacies: but I take the reaſon to be, for that it is preſumed that the Teſtator did not intend to give Legacies to ſo good an uſe in that extremity, but in caſe he ſhould die of that ſickneſs; and ſo not dying, the Legacy is revoked [p].

[k] Auth. ſi capt. C. de epiſc. & cler. Mant. de conject. ult. vol. l. 12. tit. 1. n. 34. quod quidem in legatis & fidei com. quæ nuda voluntate adimi poſſunt, multo facilius admittitur, quam in hær. inſt. ut in L. 3. § ult. & L. ex parte. ff. de adimen. lega. & Maſc. de prob. concluſ. 1280. n. 150. Verum tum dic. (ut per Bar. in d. L. ex parte.) Inſtitutum propter graviſſ. inimicitias à ſe ortas hæreditatem amittere.

[l] L. filium. de ineff. teſtim. Hier. Franc. in L. quicquid. de reg. jur. ff. Mantic. de conject. ult. vol. lib. 12. tit. 1. n. 25.

[m] L. ſi ſcriptis. ff. de his quibus ut indig. Mantic. de conject. ult. vol. lib. 12. tit. 1. n. 24. [n] L. 2. ff. ſi quis aliq. teſtari prohib. vide quæ inferius ſcripta ſunt § 18. [o] Bar. in rep. L. C. de ſacroſanct. eccleſ. n. 41. Repertor. Bertach. verb. teſta. revocatur. n. 47. [p] Bar. & Bertach. ubi ſupra.

It is (5) a queſtion appertaining to the revocation of a Teſtament not altogether free from doubt, whether a Teſtament may be revoked by a bare and naked revocation, that is to ſay, whether the Teſtament be ſufficiently revoked, when the Teſtator ſaith, *I revoke my former Teſtament*, or, *I will that my former Teſtament be of no force.*

Many Writers are of this opinion, that the Teſtament is not revoked by a bare revocation before witneſſes, unleſs the Teſtator had added unto his former words, and ſaid, *becauſe I will die Inteſtate* [q].

[q] Bar. in L. ſi jure. ff. de leg. 3. Alex. & alii in L. ſancimus. C. de teſta. quorum opinio multorum teſtimonio communis eſt. Dec. conſil. 582. Clar. § teſt. q. 91. Graſſ. § teſt. q. 84. Simo de Prætis de Interp. ult. vol. l. 4. fol. 226. Vaſqu. de ſucceſſ. crea. l. 2. § 15. requiſit. 17. n. 62. ubi ſic, Sicut (inquit) ſi vas aureum, vel argenteum, vel luteum feceris, deinde juſſeris illud infectum fieri, non per hoc infectum fiet, niſi manus adhibeas, illudque fregeris: ita quoque teſt. &c. Sed Bar. alia ratione nititur, quia viz. ex hac voluntate non poteſt adiri hæreditas.

Others

Others are of a contrary opinion, eſteeming that it is ſufficient to make a bare revocation without any expreſs mention of dying inteſtate [r]. And this opinion, in my underſtanding, is more ſound and more reaſonable. For whiles the Teſtator will not have his Teſtament to ſtand, it followeth that it is his will and meaning to die inteſtate †, and ſo the next of kin to be called to the Adminiſtration of his goods. Beſides, it ſeemeth abſurd and unreaſonable to maintain a Teſtament, not onely without a man's will, but even againſt his will [t]; at leaſt within this Realm of *England*, where we do not obſerve the ſolemnities of the Civill Law, this opinion is to be preferred: for even by the Civill Law Legacies are taken away by a ſimple and naked revocation [v]; and ſo be divers Teſtaments; thoſe, I mean, wherein thoſe ſolemnities are not neceſſary, as Teſtaments *ad pias cauſas* [x], or amongſt the Teſtator's children [y], or military Teſtaments [z]. Wherefore as thoſe Teſtaments are reclaimed and made void by a bare revocation; ſo ought our Teſtaments to be meaſured with the ſame line, and to enjoy like liberty, as well in the diſſolution, as in the conſtitution [a].

[r] Bald. in L. ſancimus. C. de teſta. Socin. Jun. conſil. 145. aſſerens hanc ſententiam pluribus & majoris ponderis authoritatibus confirmatam. Quinimo narrat eandem cuilibet ſenſato & rationabili intellectui quadrare, & quemlibet Judicem poſſe ab opinione Bar. recedere. Cum quo etiam convenit Mantic. de conject. ult. vol. lib. 12. tirul. 15. Idem vid. Pap. q. 200. & Barb. conſil. 60. vol. 2. & Raph. Cuma in d. L. conſil. 104. vol. 2. Bald. d. conſil. 104.

† Alex. ſi jure, non dubitans pronunciare conſiderationem Bartoli eſſe Truſſam.

[t] Mantic. d. lib. 2. tit. 15. n. 22.

[v] L. 3. ff. de alimen. leg.

[x] Alex. poſt

[y] Alex. eod. conſil. 104.

[z] Vaſq. de ſucceſ. reſoluc. lib. 1. § 9. n. 7.

[a] Conſulas Vaſqu. d. n. 7. ubi teſta. militar. eam ob cauſam nuda voluntate poſſe diſſolvi contendit, quia nuda voluntate poteſt conſtitui, per L. nihil tam naturale. de reg. jur. ff. Conſulas etiam de hac re Maſc. de probac. concl. 1282. n. 36. qui has diſſidentes op. diſtinctionis fœdere conciliare conatus eſt.

A revocation may be by word onely, without being expreſſed in the Will or any other writing: likewiſe revocations may be by act and operation of Law, as well as by fact or any expreſs terms.

A. ſeiſed of *Black acre* and of *White acre* in fee expectant upon a leaſe for years of *White acre*, maketh his Will in writing, and after his Will made covenanteth with D. to make a feoffment of *Black* and *White acre* to the uſe of himſelf for life, and of C. his intended wife for her life; the feoffment is executed in *Bl. ac.* but not *White ac.* nor was there any attornment of the tenants; the marriage taketh effect, and A. after dieth. Adjudged, that the feoffment without any execution of livery or attornment in *White ac.* was a countermand of the Will for *White acre* [b].

[b] H. 38 Eliz. rot. 1044. *Mountague* verſ. *Jefferies*. Moors rep. fol. 429. n. 599.

If a man ſaith that he will revoke his Will which he hath made, that is not any revocation, without the doing of ſome other act [c].

[c] M. 38, 39 Eliz. B. R. per Popham. Roll. abridg. tit. deviſe, P.

If one ſaith that he will make a feoffment thereof to another, that is no revocation before it be done: but if a man deviſe land to another by his Will in writing, and after deviſeth it to another by parol, albeit that is void as a Will, yet it is a revocation of the former [d].

[d] 44 E. 3. 33. 2 R. 3. 3. Roll. tit. deviſe, R.

If a Teſtator alien the land deviſed, and after repurchaſe the ſame, yet the Will is revoked as to the land.

One made his Will in writing, and deviſed his land to A. and her heirs; afterwards being ſick and lying upon his death-bed, (becauſe A. did not come to viſit him,) he affirmed that A. ſhould not have any part of his lands or goods: it was held by all the Court, that it was not

not any revocation of his Will, being but by way of diſcourſe, and not mentioning his Will; but the revocation ought to be by expreſſe words, that he did revoke his Will, and that ſhe ſhould not have his lands given unto her by his Will, or ſuch like words, which might ſhew his intent to make an expreſſe revocation thereof *.

If one make his Will in writing of land, and afterwards upon communication ſaith, that he hath made his Will, but it ſhall not ſtand; or, I will alter my Will; theſe words are not any revocation of the Will, for they are words but *in futuro*, and a declaration what he intends to doe: but if he ſaith, I do revoke it, and bear witneſs thereof, he doth hereby declare his purpoſe to revoke it *in præſenti*, and it is then a revocation [f].

A woman ſeiſed of lands made her Will, and deviſed the ſame to B. and his heirs; they after intermarry; and the woman by words after marriage revoketh the Will, and ſaith that her husband ſhall not have the land by her Will, and dies: adjudged that the husband ſhould take nothing thereby [g].

One deviſed his lands to his ſiſter in fee, and after made a leaſe to her for 6 years of the lands, to commence after his deceaſe, and delivered it to a ſtranger to the uſe of his ſiſter; which ſtranger did not deliver it to her in the Teſtators life-time; ſhe refuſed, and claimed the inheritance: adjudged, becauſe the deviſe and the leaſe made to one and the ſame perſon, beginning at the ſame time, cannot ſtand together in one and the ſame perſon, that it was a countermand of the deviſe: but if the leaſe had been made to any other then the deviſee, they might ſtand together, and the leaſe ſhould not have been a revocation of the Will as to the inheritance, but onely during the term [h].

If a man poſſeſſed of a term for 40 years deviſe the ſame to his wife, and after leaſe the ſame to another for 20 years, and die; that leaſe is not a revocation of the whole eſtate, but onely during 20 years, and the wife ſhall have the reſidue by the deviſe [i].

If a man ſeiſed in fee deviſe the ſame to I. S. in fee, and afterwards make a leaſe thereof to I. D. for years, this is no revocation of the fee, but onely during years [k].

If a man hath a leaſe for years, and diſpoſes of it by his Will, and afterwards ſurrenders it up, and takes a new leaſe, and dyeth; the deviſee ſhall not have this laſt leaſe, becauſe it was a revocation of his Will [l].

* P. 4 Jac. B. R. *Sympſon* verſ. *Kirton*. Crook part 2. pl. 2. 115.

[f] M. 16 Jac. B. R. *Fitzhugh Cranuel* verſ. *Saunders*. Crook. part 2. pl. 3. 487.

[g] M. 30, 31 Eliz. C. B. Anderſons caſ. 117. Coke, tit. 4. fol. 61. *Forſe* and *Houblings* caſ.

[h] M. 2 Jac. C. B. *Coke* and *Bullocks* caſ. Crook. part 2. fo. 49.

[i] T. 19 Jac. B. R. rot. 596. *Hodgkins* verſ. *Whood*. Crook part 2. fo. 690.

[k] M. 38 Eliz. B. R. inter *Mountague* and *Jefferyes*. Roll. abridg. tit. deviſe, tit. V.

[l] T. 30 Eliz. C. B. *Aſhbie* and *Livers*. caſ. Goldsb. fo. 92.

§ XVI. Of cancelling the Teſtament.

1. *A man's mind is known as well by deeds as by words.*
2. *Of the effect of cancelling Teſtaments.*
3. *Whether a nuncupative Teſtament loſe his force by cancelling the writing.*
4. *Divers caſes wherein the Teſtament is not hurt by cancellation.*
5. *If it be unknown who did cancell the ſame, to whom is the ſame to be attributed.*

ANother of the means whereby the Teſtament, which was good at the beginning, is afterwards made void, is the cancelling or cutting of the Teſtament [a]. For the (1) will and meaning of a man is no leſs ſhewed by his deeds then by his words [b]: and therefore (2) he that cancelleth or defaceth his Teſtament is thereby thought to have this will and meaning, to take away the force and virtue thereof [c]. Which will in this reſpect ought to be obſerved for a law, and ſo the Teſtament cancelled and defaced is to be adjudged void [d].

[a] Cancel. eſt in modum crucis expungere vel illinire. Bar. in L. 1. § ſed conſ. ff. de his quæ teſt. de J. Spieg. Lexic. vet. cancellare.

[b] Minſin. in § ex eo. Inſt. quib. mod. teſta. infir. Vaſq. de ſucceſſ. crea. l. 2. req. 17. n. 62. [c] L. 1. & L. proxime. ff. de his quæ teſt. del. & DD. ibi. Vaſ. de ſucceſ. crea. § 15. requiſ. 17. n. 60, 61, &c. [d] Intellige ope exceptionis, non ipſo jur. gloſſ. in L. 1. ff. de his quæ teſt. del. quæ op. eſt com. Graſſ. theſ. com. op. q. 85. n. 1.

And that this cancelling or defacing of the Teſtament being objected * doth deſtroy the force thereof, is ſuppoſed to be extended to thoſe Teſtaments Nuncupative which afterwards be reduced to writing [f]: ſo that (3) if a man firſt make his Teſtament by word of mouth, then cauſeth the ſame to be written, and afterwards doth wittingly and willingly cancell or cut the ſame writing, or otherwiſe deface it, that then ſuch Teſtament is void, as if it had been written at the beginning [g]. Neither doth it profit to prove the ſame by witneſs [h]: for although the inſtrument or writing do not appertain to the ſubſtance of the Teſtament; yet by the cancelling thereof, the Teſtator is preſumed to have repented of the making thereof, and to have reclaimed or revoked the ſame [i]. Furthermore, albeit there appear no cauſe of unworthineſs either in the Executor, or any other Legatary, whereby the Teſtator might be moved to diſappoint them of their hope; yet by cancelling the Teſtament the whole Teſtament ſhall be void [k], and the Teſtator is preſumed to have done it in their favour who are to have the Adminiſtration of his goods after he dieth inteſtate [l].

* Alias ipſo jur. non viciat. d. gloſ. communiter recepta.

[f] Paul. de Caſtr. in L. fin. ff. de his q. teſt. del.

[g] Zaſ. conſ. 2. vol. 1. n. 29. Graſ. Theſ. com. op. § teſt. q. 85. ubi hanc ſententiam & veriorem & humaniorem refert: & huic etiam ſententiæ ſubſcripſit. Vaſq. de ſucc. crea. l. 2. § 15. requiſ. 17. n. 61, 62 quicquid in contrarium ſtat. Jul. Clar. § teſt. q. 93. vel Minſing. in § pen. inſt. quib. mod. teſt. infir. vel ante eos Bald. in d. L. fin. vel poſt eos Maſc. de prob. concluſ. 1282. n. 31. [h] Vaſ. d. requiſit. 17. n. 63. [i] Vaſq. & Graſſ. ubi ſupra. [k] Vaſq. de ſucceſſ. reſoluc. l. 1. § 4. in prin. Doct. in L. cancel. & in L. proxime. ff. de his quæ teſt. del. [l] Dyn. & DD. communiter, in L. noſtram. ff. de his quæ teſt. del. Mant. de conject. ult. vol. l. 12. tit. 1. n. 31. Clar. § teſt. q. 93. Graſſ. § teſt. q. 85.

The

The caſes (4) wherein this former concluſion, *viz.* that by cancelling or defacing the Teſtament the ſame is void, doth fail, are theſe.

The firſt is, where the Teſtament was cancelled by the Teſtator himſelf unadviſedly, or by ſome other perſon without the Teſtator's conſent, or by ſome other caſualty [m].

[m] L. 1. § ſed conſ. ff. de his quæ teſt. del. Bar. in L. ſi jur. de leg. 3. Angel. Arc. & Minſin. in § ex eo. Inſt. quibus mod. teſt. infir.

The ſecond caſe, when the Teſtator, after he hath wittingly and willingly pulled away the ſeals, doth ſeal the ſame again [n].

[n] L. ſi teſt. ff. qui teſt. fac. poſſ.

The third caſe is, when the whole Teſtament is not cancelled or defaced, but ſome part thereof onely raſed, blotted, or put out; for the other parts of the Teſtament do remain firm and ſafe [o] as they were before, although the deletion were in the chief part of the Teſtament, namely the aſſignation of the Executor [p].

[o] L. prox. § ſent. ff. de his quæ teſt del. Mant. de conject. ult. vol. l. 12. tit. 1. n. 31. in fin.

[p] Weſ. in d. tit. de his quæ in teſt. del. ff. Mantic. ubi ſupra.

The fourth caſe is, when there be ſeverall papers or writings of one tenure, each of them containing the whole Teſtament; the defacing or cancelling of ſome of them doth not hurt the Teſtament [q]: unleſs it be proved that the Teſtator's mind was contrary [r].

[q] L. plurib. ff. de his quæ in teſt. del.

The fifth caſe is, when the Teſtament is loſt, either in the life-time of the Teſtator, or after; for ſo much as may be proved by witneſſes is ſtill in force †.

[r] d. L. plurib. & ibi Doctores.

† L. 1. § ſed conſul. ff. de his quæ in teſt. del. cum gloſſ. ibid. De prob. teſt. originali amiſſo. vid. Sim. de Præt. de interp. ult. vol. l. 1. fol. 204. n. 82.

What (5) if the Teſtament be found cancelled and defaced, but it is not known who did cancell it or deface it? to whom is this act of cancelling or defacing the Teſtament to be attributed? to the Teſtator which made it; or to ſome other, which otherwiſe peradventure might be hindered by it?

It ſeemeth not to be reputed the act of the Teſtator [s]: for mutation or change of the mind is not to be preſumed [t]; eſpecially after a man hath done a thing with ſuch deliberation and reſolution, wherewith Teſtaments commonly are made and finiſhed [x].

[s] Zaſ. conſil. 2. l. 1.

[t] L. cum qui. ff. de probac.

[x] Supr. 1. par. § 3. verb. ſent. & hac ipſa parte ſuperius paulo, viz. § 13.

On the contrary, it ſeemeth that it ought not to be accounted the act of any other [y]: for that were to preſume fraud and deceit in men; which ought not to be preſumed, unleſs it be proved [z].

[y] Jo. Faber in § ex co. Juſt. quib. mod. teſt. infir. Peck. de teſt. conjug. l. 1. c. 46. n. 1.

[z] L. dolum. C. de dolo.

In this controverſy therefore I ſuppoſe, that the perſon in whoſe cuſtody the Teſtament is found ſo cancelled or defaced is to be adjudged to have done the act, whether it be the Teſtator or another [a].

[a] DD. in L. ſi unus. C. de teſt. Mantic. de conject. ult. vol. l. 12. tit. 1. n. 30. Hyer. Pantiſn. q. n. 17. fol. 486.

And if it be so that the Testament were kept in such a place, as not only the Testator but others might have access unto it; in this case the arguments and circumstances of the fact being equall and indifferent, the cancelling or defacing of the Testament is rather to be ascribed to the Testator then to others [b]; who is also presumed to have done the same wittingly and willingly [c]: saving in Legacies of freedome, or *ad pias causas*, which being blotted or put forth by the Testator, it is not presumed to have been done willingly [d]. But when the arguments and circumstances be unequall, and the greater presumptions that it should be the act of another rather then of the Testator, it is to be adjudged accordingly *: for the fewer and weaker presumptions give place to the more and stronger [f].

[b] Zas. de cons. 2. vol. 1. n. 1. & n. 15. Fab. in § ex eo. inst. quib. mod. test. infir. Menoc. de præsumpt. l. 4. Præs. 165. n. 24.

[c] Paul. de Castr. in L. 1. § sed cons. ff. de his quæ in test. del.

[d] Paul. de Castr. in d. § Tiraquel. de pia causa, privileg. 16. Mant. de conject. ult. vol. l. 12. tit. 2. n. 25.

* Zas. cons. 1. n. 15, 16, 17, 18, &c.

[f] C. afferte mihi glad. de præsumpt. extr. Mant. de conject. ult. vol. l. 12. tit. 17. & Zas. ubi supr.

§ XVII. Of the alteration of the state of the Testator.

1. *What manner alteration of the state of the Testator doth make void his Testament.*
2. *Two times wherein the Testator must have power to make a Testament.*

THe alteration (1) of the state of the Testator is also a mean whereby the Testament which was good at the beginning doth after become void [a]. The which alteration may happen divers waies [b]: but especially when the Testator is convicted or condemned of such a crime, after the making of his Testament, for the which the Law depriveth him of this power and ability of making a Testament [c].

[a] § Alio. Inst. quibus modis test. infir.

[b] Viz. maxima & media capitis diminut. gloss. in d. § alio. Item voluntarie, & invite. Minsing. in § non tamen Instit. eod. tit.

[c] d. § alio, & ibi gloss. & DD.

What manner of crimes they be whereby the state of the Testator is so altered, that thereby he is made intestable, is above expressed [d]; to wit, heresy, apostasy, treason, felony, sodomy, incest, manifest usury, and such like: whereunto also I might add captivity *; not for that captivity is a crime, but for that it hath the same effect with those crimes to overthrow the Testament. But if the captive recover his former liberty, then the Testament made before the captivity recovers his former force [f]. And if he that is convicted or attainted of treason or felony obtain the Prince's pardon, with restitution to his former state, then the Testament made before such his conviction is likewise revived and restored [g]: and in both cases the Testament is good, without any new confirmation or declaration [h]. Howbeit in this they differ; for the Testament of the person which recovereth his former liberty is good even from the beginning, as if he had never been in captivity [i]: but his Testament whose crime is pardoned, and himself restored, is of force onely from the time of restitution [k]. Again, if the

[d] De quibus sigillat. supra par. 2. & par. 5.

* L. ejus qui apud hostes. ff. de test. supra part. 2. § 8.

[f] § Non tamen. inst. quib. mod. test. infir.

[g] L. si quis. § quatenus. ff. de injust. testam.

[h] Quod verum quidem est in capitis diminutione necessaria, secus in voluntaria. Minsing. & Platea in d. § non tamen.

[i] Grass. Thes. com. op. § test. q. 25.

[k] Jo Platea in d. § non tamen.

the pardon do onely import a remiſſion of the penalty, without reſtitution of his former eſtate, then the Teſtament before made doth ſtill remain void [l].

[l] Minſing. in d. § non tamen.

And here note, (2) that there be two times wherein it is neceſſary that there be in the perſon of the Teſtator ability to make a Will. The one is, the time of the making of the Teſtament, when it receiveth his ſubſtance or being: the other is, the time of the death of the Teſtator [m], when it receiveth his ſtrength and efficacy. (As for the time betwixt the making of the Teſtament and the death of the Teſtator, it skilleth not whether the Teſtator have any ſuch power or not [n].) And therefore if any perſon being attainted of ſome crime, do whilſt he is inteſtable make his Teſtament, and afterwards obtain a full pardon, with full reſtitution, the Teſtament nevertheleſs is void, becauſe of the originall defect [o].

[m] d. § non tamen. L. 1. § exig. de bon. poſſ. ſecundum Tab. infr. § 19. Porc. in § in extraneis. Inſt. de hær. qual. & differ.

[n] d. § non tamen. & Minſing. ac alii ibid.

[o] Aretin. in d. § non tamen. Sim. de Præt. de interp. ult. vol. l. 1. fol. 146. n. 56.

§ XVIII. Of forbidding or hindring the Teſtator to make another Teſtament.

1. *The former Teſtament is void, where the Teſtator is forbidden to alter the ſame, or to make a new Teſtament.*
2. *Divers extenſions of this foreſaid concluſion.*
3. *Of hindring the Notary or Witneſſes to have acceſs to the Teſtator.*
4. *Of diſturbing the Teſtator by making a noiſe.*
5. *Of immodeſt perſwaſions.*
6. *Whether this prohibition be proved by the aſſertion of the Teſtator.*
7. *Divers limitations of the firſt concluſion, viz. that the Teſtament is overthrown, where the Teſtator is hindred in altering the ſame.*
8. *Of diſturbing the Teſtator with noiſe and weeping.*
9. *Whether the prohibition of one be prejudiciall to others.*

AMongſt many other means whereby the Teſtament, which was good at the beginning, is afterwards made void, this is one not to be omitted, (ſeeing it is ſo often practiſed,) namely, when (1) the Teſtator, intending to alter the Teſtament before made, or to make a new Teſtament, is forbidden or croſſed, ſo that he cannot or dare not doe as he intended [a]. By this prohibition and manner of crooked dealing, the Teſtament which ſhould have been altered is made void [b].

[a] Tit. ſi quis aliquem teſt. prohib. ff. & C.

[b] L. 1. & 2. ff. ſi quis aliquem teſt. prohib. Boſſ. Tract. de var. crim. tit. de his qui aliq. teſtar. prohib. Menoc. de arb. Jud. quæſt. caſ. 395. Soc. Jun. conſil. 148. vol. 2. qui omnes locupletiſſime ſcripſerunt de hac re. Eos igitur vid. velim.

The reaſon is, becauſe as thoſe Teſtaments are not ſound at the beginning which are made by fear or fraud [c]: ſo that Teſtament which for fear or by fraud the Teſtator dare not or cannot alter, is from henceforth infected with the ſame diſeaſe, and ſo from henceforth to be eſteemed of no more force or efficacy then theſe other [d].

[c] Supr. eod. par. §§ 2. & 3.

[d] Weſ. in tit. ſi quis aliq. &c. ff. n. 1.

This concluſion, (2) That the Teſtament doth become void when the Teſtator is prohibited to alter the ſame, doth proceed not onely when the Teſtator himſelf is prohibited or put in fear; but alſo (3) when the Notary or Witneſſes be letted or ſtopped, that they cannot have acceſs unto the Teſtator *: for he that doth not permit, is ſaid to prohibit [f]. And therefore if the wife being made Executrix, or any other perſon benefitted by the Teſtament, underſtanding that the Teſtator is about to alter his Will, will not ſuffer his friends to come unto him, pretending peradventure that he is faſt aſleep, or in a ſlumber, or the Phyſician gave in charge that none ſhould come to him [g], or pretending ſome other excuſe, or elſe (all excuſes ſet apart) do for charitie's ſake ſhut them forth of the doors [h]: in theſe caſes the Teſtament is void, in deteſtation of ſuch odious ſhifts and practices [i].

* Bar. in L. fin. ff. ſi quis aliq. teſt. prohib. Boſſ. in d. tit. de his qui prohib. &c. n. 2. Par. conſ. 67. l. 3.

[f] Par. conſ. n. 13.

[g] Peck. tract. de teſt. conjug. c. 13.

[h] Ut eſt apud Ter. præ amore excluſit eum foras.

[i] Peckius ubi ſupr.

Secondly, this concluſion hath place, if (4) after the coming of the Notary or Witneſſes, and preparation of all things neceſſary for the alteration of the former Teſtament, ſome perſon, of intent and purpoſe to hinder the altering of the ſame Will, doth make a noiſe, and keepeth ſuch a ſtir, exclaiming and quarrelling with ſuch as ſeek to have the Teſtament altered, that the Teſtator, being therewith diſturbed and offended, did not then alter his Will; and ſhortly after died [g].

[g] Anch. conſil. 337. Menoc. de Arbitr. jud. caſ. 395. n. 38, 39.

Thirdly (5,) this concluſion hath place not onely where the Teſtator is prohibited by threatnings, or hindered by fraud, but alſo when he is overcome with importunate requeſts, and fraudulent perſwaſions, not to alter his former Teſtament [h].

[h] Afflict. deciſ. 69. n. 7. Menoc. d. caſ. 395. n. 41. huc pertinet quod ſcripſerunt Inno. in c. petitio. de jurejur. ext. & Rebuff. tract. de reſcript. tom. 2. art. 2. gloſ 3.

Fourthly (6,) this concluſion doth proceed, albeit there be no ſtronger proof of violence or impediment offered to the Teſtator in this caſe, then the aſſertion of the Teſtator himſelf [i].

[i] Par. conſil. 66. n. 119. vol. 3. Soc. Jun. conſil. 148. n. 14. Men. d. caſ. 395. n. 40.

In theſe caſes following (7) the former concluſion doth not proceed. The firſt caſe is, when the Teſtator had no purpoſe to alter his Teſtament: for if any do forbid the Teſtator to alter his Teſtament, when the Teſtator hath not any purpoſe to alter the ſame; this prohibition doth not hurt the force of the Teſtament already made [k]. The ſecond caſe is, when the fear which is uſed in the prohibition is vain, or but light, ſuch (I mean) as cannot move a conſtant perſon [l]. The third caſe is, when the Teſtator is prohibited, but not at that preſent time when he intended to alter his former Teſtament; for ſuch prohibition is not hurtfull [m]. The fourth caſe, being like to the former, is, when the Teſtator, after the prohibition, might very well at ſundry times have altered his Teſtament, and did not [n]:

[k] L. 1. ff. ſi quis aliq. Bar. in L. ult. eod. tit. n. 13. Menoc. d. caſ. 395. n. 32. & eſt ejus op. quod duo ſunt proband. viz. voluntas mutandi teſt. & prohibitio. Soc. Jun. conſil. 148. vol. 2.

[l] Par. conſil. 67. n. 41. vol. 3. Menoc. d. caſ. 395. n. 32. & quæ nos dixim. ſup. eod. par. § 2.

[m] Soc. ſen. conſ. 105. vol. 3. Soc. Jun. conſ. 148. n. 3. vol. 2. Par. conſ 67. n. 33. vol. 3. Menoc. d. caſ. 395. n. 32. Boſſ. d. tit. de his qui prohib. & n. 2. in fin.

[n] Mar. Soc. Jun. conſil. 148. n. 48. vol. 2. Par. conſ. 67. n. 62. vol. 3. Men. de caſ. 395. n. 25.

for

for in not altering the Teſtament when he might, he ſeemeth to allow it and confirm it [o]. The fifth caſe is, when the Teſtator is not compelled by fear, nor circumvented by fraud, but induced with flattering ſpeeches void of deceit, (ſuch as may become an honeſt wife or faithfull friend,) not to alter his Teſtament [p]. The ſixth caſe is, when (8) all things neceſſary for the alteration of a Teſtament being prepared, the Executor or Legatary, or other perſon, with his noiſe or weeping, doth ſo diſturb the Teſtator, that he cannot alter his Teſtament: not of purpoſe to hinder ſuch alteration; but being moved with compaſſion, to ſee the Teſtator grievouſly afflicted with ſickneſs, or being ſtricken with an unfeigned ſorrow, through fear of the Teſtator's death, or otherwiſe overcome with an honeſt or kind care or grief, and not able to ſuppreſs the force of this vehement paſſion, doth burſt into tears, and ſo with noiſe of his lamentations doth diſturb the Teſtator, that he cannot proceed in the alteration of his Will. In this caſe the former Teſtament is not made fruſtrate by ſuch diſturbance, albeit after that the Teſtator never had the like opportunity of altering his Teſtament. Howbeit the Judge muſt be very wary, and learn by the circumſtances of the fact, whether this noiſe and exclamation be of policy, or of ſimplicity [r]. The ſeventh caſe is, when (9) the Executor or Legatary doth forbid or hinder the Teſtator to alter his Teſtament. In which caſe the former Teſtament is void onely in prejudice of that perſon which doth prohibit or hinder the Teſtator to alter the ſame, but not in prejudice of another not conſenting thereunto †: much leſs doth the prohibition of that purpoſe by him who is to reap no benefit by the Teſtament, hurt thoſe Executors which otherwiſe ſhould be Adminiſtrators in caſe the party died inteſtate [t]; unleſs it doth appear that the Teſtator would have changed his whole Teſtament, and have appointed new Executors; for then this prohibition maketh void his whole Teſtament, like as if the Teſtator had been compelled to make the ſame at the firſt [v].

There is much adoe in the Civill Law about this queſtion, who ought to have the Teſtator's goods, when he is compelled to make his Teſtament, or hindered that he cannot revoke his Teſtament, the Prince, or the heirs of the dead perſon. But with us, if any die inteſtate, the Adminiſtration of his goods is to be committed to the widow, or next of kin, and doth not go to the Prince, though the Executor or Legatary be unworthy.

[o] Maſc. de probac. concl. 1280. n. 54. Mant. de conject. ult. vol. l. 12. tit. 1. n. 12. Per. tract. L. ff. de teſt. mil quod tamen ſerio conſiderandum eſt, ut per Mant. ubi ſupr. & Peck. tract. de teſt. conjug. l. 1. c. 11.

[p] Menoc. d. caſ. 395. n. 42. Per. L. ult. ff. ſi quis aliq. teſt. prohib.

[q] Par. conſil. 67. vol. 3. n. 47, 48. Soc. Jun. conſil. 148. vol. 2. n. 33. verb. nam dum primo, &c.

[r] Menoch. d. caſ. 395. n. 39.

† L. 2. ſi quis aliq. teſt. prohib. ff.

[t] Menoc. d. caſ. 395. 20. poſt Bar. in L. ult. ſi quis aliquem teſt. prohib. ff. n. 11.

[v] Bar. in d. L. ult. Men. d. caſ. 395. n. 17. Par. conſ. 67. vol. 3.

§ XIX.

§ XIX. When he that is made Executor cannot or will not be Executor.

1. *Though the Executor be incapable, the Legacies are ſtill due.*
2. *The Executor ought to be capable of the Executorſhip at three ſeverall times.*
3. *It is ſufficient for the Legatary, if he be capable of the Legacy at the Teſtator's death.*
4. *What if the diſpoſition be conditionall.*

ALbeit (1) where he that is named Executor in the Teſtament either cannot or will not be Executor, by the Laws of this Realm the Legacies bequeathed in the ſame Will are ſtill due, and to be paid by ſuch as ſhall have the Adminiſtration of the goods of the deceaſed [a]: (in which caſe the Will is to be annexed to the letters of Adminiſtration (as heretofore I have declared [b]:) yet by reaſon of the incapacity or refuſall of the Executor, ſuch diſpoſition is thereby deprived both of the name and nature of a Teſtament [c]; and ſo the party is ſaid to die inteſtate.

[a] Brook Abridg. tit. execut. n. 20. dixi, jure hujus regni; nam ſecus eſt jure civili, hæreditate non adita. L. 1. in fin. de injuſto teſtim. L. fidei commiſſum. de leg. 1. L. imperator. de leg. 2. ff. licet hoc non ſit indiſtincte verum, ut ſublimitac. l. 12. c. 9. per Vigelii method. juris civil. à quo tradita eſt regula cum plurimis limitationibus &

[b] Supr. part. 1. § 6. n. 6.

[c] Inſtit. tit. de hær. quæ ab inteſtat. def. in princ. Brook ubi ſupr.

I ſhall not need to repeat here particularly, by what means the Executor may become incapable of the Executorſhip.

This one thing I thought good to note in this place, that by the Civill Law, (2) he which is named Executor muſt be capable of the Executorſhip at three ſeverall times [d]. Firſt, at the making of the Teſtament; for then the Teſtament taketh his ſubſtance or being [e]. Secondly, at the time of the death of the Teſtator; for then the Teſtament receiveth his ſtrength and confirmation [f]. Thirdly, at the time of the probation of the Will, and undertaking the Executorſhip; for then the Teſtament entereth to his effect and execution [g]. Howbeit it is (3) ſufficient in a Legatary, if he be capable of the Legacy or deviſe at the time of the death of the Teſtator [h]; unleſs the deviſe be not pure and ſimple, but conditionall: for in conditionall diſpoſitions both the Executor and alſo the Legatary muſt be capable at the time of the performance or exiſtence of the condition [i]. As for any other time, whether it be betwixt the making of the Will and the Teſtator's death, or betwixt his death and the probation of the Will, it skilleth not: for though the Executor be then incapable, it hurteth not [k]; eſpecially if (4) the diſpoſition be conditionall: for then it is not required in the Executor (much leſs in the Legatary) that he be capable at another time, ſaving onely at the time of exiſtence or performance of the condition, no not at the making of the Will, or death of the Teſtator [l].

[d] § in extraneis. Inſtit. de hær. qual. & differentia. vide ſupra part. 5. § 2. & quæ in illo § adnotavi.

[e] Chriſt. Porcus in d. § in extraneis.

[f] Idem Porcus in eod. §.

[g] Idem ibid. quamvis Jaſ. hiſce rationibus totus non acquieſcat, quippe qui alias meliores atque (ut ille inquit) fundamentaliores aſſignat, in ſuis addic. ad Chriſt. Porcum in d. §.

[h] Bar. in L. ſi alienum. § 1. ff. de hære. inſtit. in fin. Peckius Tract. de teſtam. conjug. l. 4. c. 31. n. 5. Graſſ. Theſ. com. op. § Inſtitutio. q. 28. n. 4.

[i] Bar. Graſſ. & Peckius ubi ſupra.

[k] § in extraneis. Inſtit. de hæred. qual. & differentia.

[l] Alex. in L. 2. ff. de vulg. & pub. ſup. n. 11. Graſſ. d. § Inſtitutio. q. 28. n. 3. quæ op. com. eſt, licet non deſint qui contrariam teneant.

If

If the Executor do refuſe to undergo the burthen or office of an Executor, then he loſeth whatſoever Legacy is left unto him in the Teſtament [m]; ſaving as elſewhere is recited [n].

[m] Bar. & Sich. in L. ſi legatarius, C. de legatis.
[n] Supra part 6. § 3.

§ XX. Of ademption of Legacies.

1. *By what means Legacies become void.*
2. *Ademption of Legacies what it is.*
3. *Ademption of Legacies twofold.*
4. *The Teſtator may at any time alter his Will, either wholly, or in part.*
5. *Ademption of Legacies not to be preſumed.*
6. *Corn in the barn being bequeathed, whether the ſame being ſpent, and other Corn there at the death of the Teſtator, the Legacy be extinguiſhed.*
7. *Whether the Ship bequeathed being altered and renewed, the Legacy be extinguiſhed.*
8. *Whether the houſe bequeathed, being by piece-meal re-edified and renewed, may be recovered.*
9. *What if the Teſtator do voluntarily pull down the houſe, and erect another in place thereof?*
10. *What if the houſe be burned, or blown down, and another erected? whether may this new houſe be recovered?*
11. *An anſwer to an objection.*
12. *Whether by neceſſary alienation of the thing bequeathed, the Legacy be adempted.*
13. *What if the alienation be voluntary? is the Legacy extinguiſhed?*
14. *What if the voluntary alienation be void in law?*
15. *What if the Teſtator ſhould redeem the thing alienated?*
16. *Whether Lands deviſed, alienated, and redeemed, may be recovered.*
17. *The reaſons of either law being contrary in this point.*
18. *If the thing bequeathed be pledged, it is not thereby adempted.*
18. *Whether the receiving of the debt bequeathed by the Teſtator be an ademption of the Legacy.*
20. *A flock of ſheep being bequeathed, whereof one alone is left, whether that one be due.*

MAny other (1) means there be whereby the Teſtament, which was good at the beginning, becometh void afterwards [a]: but it were too long to reherſe them all: let it ſuffice therefore, that I have ſpoken of ſuch as haply may the ofter fall out in fact. Now it remaineth that I ſpeak of ſuch means, whereby Legacies given and bequeathed by the Teſtator become void. Of which means ſome do proceed from the fact of the Teſtator [b]: ſome have relation to the fact or perſon of the Legatary [c]: ſome to the thing bequeathed [d].

[a] Centum pene caſus quibus reſolvitur teſtim. commemorat Vaſ. de ſucceſſ. reſoluc. lib. 1.
[b] Hoc ipſo § & § ſeq.
[c] Inf. §§ 22. & 23.
[d] Infra § ult.

In respect of the fact of the Testator are Legacies made void especially by Ademption, and by Translation of the thing bequeathed *.

Ademption (2) is a taking away of the Legacy before bequeathed f: *Translation* is a bestowing of the Legacy bequeathed upon some other person g. Ademption may be without translation, but translation of a Legacy cannot be without ademption h.

Ademption (3) of Legacies is two-fold, expressed, and secret i. *Expressed*, when the Testator doth by words take away the Legacy before given k: *Secret*, when the Testator doth by deeds without words take away the Legacy; as when he doth give away the thing bequeathed, or doth voluntarily alienate the same before his death l.

It is (4) lawfull for every Testator m, so long as he liveth, to revoke or alter his Will n, either wholly or in part o, either in the same Will or in another, either solemn or unsolemn p, simply or conditionally.

* Instit. tit. de ademp. & transla. legatorum. & tit. de adimen. vel transferend. leg. ff.
f DD. in d. Rub. de ademp. & transl. leg. Instit.
g Minsin. in d. Rub.
h Minsin. ubi supra. Wesen. in tit. de adimen. vel transferend. leg. ff.
i Wesen. in d. tit. de adimen. leg. ff.
k L. 2. & 3. de adimen. leg. ff.
l L. rem legatam. de adimen. leg. ff.
m L. 3. de re jud. L. 3. de reg. jur. ff. n L. 4. de adimen. leg. ff. o L. ult. de adimen. leg. ff.
p Quod si alio testamento insolenni fiat ademptio, tunc non ipso jure, sed ope exceptionis, tollitur leg. Gras. Thesa. com. op. § legat. q. 78.

When the Testator doth expresly revoke the Legacy, it is not materiall whether he do use words direct contrary, as, *I do not give*, *I do not bequeath*, or any other words whatsoever, so that his meaning may appear r.

Ademption (5) of Legacies is no more to be presumed then the revocation of the Testaments †, unless it be proved t. And therefore (6) if the Testator do bequeath all the Corn in his barn, and after the making of his Will, the Testator surviveth untill all the corn be spent, and other corn put in the place thereof v: this spending of the corn is no ademption of the Legacy; and therefore the Legatary shall have such corn as is found in the barn when the Testator dieth x, unless the corn found in the barn at the death of the Testator be greater in quantity then was the corn at the time of the Will making; for so much is due, but not a greater quantity then was the first y.

* L. 2. & 3. ff. de adimen. leg. Instit. tit. de ademp. legat.
† Bald. in L. si pluribus. ff. de leg. 1. Mant. de conject. ult. vol. l. 12. tit. 2. n 2.
r L. eum qui voluntatem. ff. de probac.
v Secus si non sit repositum per modum surrogationis, ait Angel in L. si servus. § qui quinque. ff. de leg. 1. Masc. de probac. concluf. 1283. n. 33. x Bar. in d. § qui quinque. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 9. y Paul. de Castr. in d. § qui quinque. Masc. de probac. d. concl. 1283. n. 33, 34.

Likewise if (7) the Testator do bequeath a Ship, and afterwards doth by piece-meal repair and renew the same, so there remaineth nothing of the old ship but onely the bottome tree: here is no ademption of the Legacy, and therefore the Legatary may recover the whole ship z.

z L. quod in rerum. § & si navem. ff. de leg. 1. Spiegel. Lexic. verb. carina. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 7.

Or if (8) the Testator do bequeath an House, and afterwards by piece-meal repair the same, so that there is no part of the old matter or stuff remaining; the Will of the Testator is not hereby presumed to be changed,

changed, and therefore the Legatary may recover the houſe ſo repaired [a]. For it is deemed to be the ſame houſe ſtill in law, as in the former caſe it is deemed to be the ſame ſhip [b].

But if (9) the Teſtator did at once voluntarily pull down all the whole houſe bequeathed, and did afterwards erect a new houſe in the ſame place; then, by the Civill Law, the Will of the Teſtator is preſumed to be changed, and the Legacy extinguiſhed [c]. And although by the Laws of this Realm it may be otherwiſe in contracts and covenants amongſt ſuch as be living [d]: admit it were ſo, (as in ſome ſort it is anſwerable to the Civill Law *,) yet the reaſon of the difference is not obſcure, which is this: In contracts, covenants, and grants made amongſt ſuch as be living, he to whom this or that is lawfully granted, hath by and by a certain right and intereſt therein [f], which without his conſent ought not to be impaired [g]; and whatſoever is builded upon another's ground yieldeth thereunto, and thereby becometh his which is the owner of the ground [h]. But in a Teſtament or laſt Will there is no ſuch right derived to the Legatary in or to the thing bequeathed, untill the Teſtator be dead [i]: and therefore if in the mean time the Teſtator do alter his mind, (which alteration is manifeſt as well by deeds as by words [k],) in this caſe the Legatary, which hath no right, cannot make ſuch claim to the thing bequeathed as another may doe, to whom a thing is covenanted or granted, and ſo hath a right and intereſt therein [l]. Indeed if the Teſtator were dead, and ſo a right in the Legatary, and then the Heir or Executor ſhall pull down the houſe deviſed, and erect a new houſe in the ſame place, the Legatary might recover the new builded houſe [m]: but being pulled down by the Teſtator whiles as yet there was no right or intereſt in the Legatary, the Legacy is extinguiſhed [n], as is aforeſaid: unleſs a contrary meaning be proved in the Teſtator, *viz.* that he did not intend to revoke the deviſe, by deſtroying the ſame deviſed [o]; becauſe peradventure he did proteſt [p], before he cauſed the houſe to be pulled down, that he did not thereby mean to make void the deviſe; or after the re-edifying thereof, did ratifie and confirm his former Will [q]; or did manifeſt his meaning by other equivalent conjectures. Without which proof of ſuch the Teſtator's meaning, the Legacy is ſo ſurely extinguiſhed, that albeit the Teſtator did pull down the houſe with intent to re-edifie the ſame, or to make it bigger [r], and albeit it were re-edified of the ſame matter or ſtuff†, yet it cannot be recovered as due to the Legatary: for now, having a new form, it is not the ſame, but another houſe [t]; and ſo being another thing then that which was bequeathed, how can it be rightly challenged by the Legatary [v]?

[a] L. ſi ita legatum § ſi domus. ff. de leg. 1.
[b] Jaſ. in § ſi domus. n. 1. Maſcard. de prob. conclu. 1280. n. 21. Zaſ. in d. § & ſi navem.
[c] Paul. de Caſtr. in d. § ſi domus. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 6.
[d] Id quod non ſemel mihi nunciatum fuit.
* Intellige quoad jura realia, quorum intuitu ædificium deſtruct. & reſtitutum cenſetur idem. L. ſervitutes. § ſublarum. ff. de ſervit. verb. præd.
[f] Bar. & alii in d. § ult.
[g] L. Id quod noſtrum. de reg. jur. ff.
[h] § Cum in ſuo ſolo. Inſt. de rerum diviſ.
[i] Bar. in d. L. ſi ita legat. § ult. de leg. 1. verb. dic ergo.
[k] L. Paulus. ff. rem rat. haberi. Weſenb. in tit. de adimen. leg. ff. n. 2. & 4.
[l] Bar. in d. § ult. & Jaſ. ibid. n. 6.
[m] L. domos. de leg. 1. ff. & ibi DD.
[n] Text. in d. L. ſi ita legat. § ſi domus. Maſcard. de probac. concl. 1280. n. 27.
[o] Eod. § ſi domus.
[p] L. at ſi clerici. § plerique. ff. de relig. & ibi Bald.
[q] Arg. L. 1. § 1. de leg. 3. ff. Brook Abridg. tit. deviſ. n. 8.
[r] Jaſ. in d. L. ſi ita. § ult. de legat. 1. ff. n. 13. in fin.
† Paul. de Caſtr. & Maſcard. ubi ſupra.
[t] Idem Caſtr. Jaſ. & Maſcard. de probac. concl. 1180. n. 25.
[v] Vide DD. in L. inter ſtipulantem. ff. de verb. oblig.

What if (10) the houſe bequeathed be blown down with violence of the wind, or be conſumed with fire, or otherwiſe by caſuall means deſtroyed againſt the will of the Teſtator, and a new houſe erected by

the Teſtator in the place where the former ſtood? whether may the Legatary recover the houſe newly erected? By the opinion of ſome he may [x]. For if the Teſtator had not erected a new houſe, by the Civill Law the ground whereon the houſe did ſtand ſhould belong to the Legatary [y]. Seeing then the ground is the Legatarie's, it followeth that the houſe is the Legatarie's alſo [z]. Howbeit the authour of this opinion in another place is of another opinion [a]: which opinion is alſo commended of other Writers as more agreeable to law [b], becauſe this houſe is another houſe then that which was bequeathed. And again the text of the Civill law is plain, that *the Houſe bequeathed being deſtroyed, if the Teſtator build another in the ſame place, the Legacy is extinguiſhed, unleſs the meaning of the Teſtator were otherwiſe* [c]. Seeing then the text doth not diſtinguiſh of the means whereby the houſe is deſtroyed, neither may we [d].

[x] Jaſ. in L. domus. ff. de leg. 1. n. 1. & in L. ſi ita legat. § ſi domus. cod. tit. n. 13.

[y] L. ſi grege legato. ff. de leg. 1. in fin. Paul. de Caſtr. in d. § ſi domus. verb. ſed pone. & ibi Jaſ. n. 2. & 7.

[z] L. ſi ſervum filii. § ſi areæ. ff. de leg. 1. Jaſ. & Paul. de Caſtr. ubi ſupr.

[a] Jaſ. in L. domus. ff. de leg. 1. n. 13.

[b] Maſcar. Tract. de probac. concl. 1280. n. 27. & Mantic. de conject. ult. vol. lib. 12. tit. 2. n. 6. [c] Text. in d. § ſi domus. [d] Maſc. & Mantic. ubi ſupra.

To the (11) former reaſon, that the ground had belonged to the Legatary, if the Teſtator had not builded a new houſe, *ergo* the houſe alſo; it is anſwered, That if it were granted (which of divers is denied) that the ground ſhould belong to the Legatary [*]; yet ſhould it not belong unto him as principall, but as acceſſary, or part of the houſe bequeathed [f]: and therefore being but acceſſary, it doth not receive any other acceſs or augmentation [g]. Howbeit, foraſmuch as theſe queſtions about houſes deviſed by Will, afterwards deſtroyed, and then re-edified, are rather to be determined by the Laws of this Realm then by the Civill Law; I do willingly yield the matter into their hands to whom it principally appertaineth.

[*] Raph. Cu. Petr. de Bexu in d. § ſi domus. & ibi Jaſ. n. 13.

[f] Bar. Paul. de Caſtr. Jaſ. in d. § ſi domus.

[g] Iidem Bar. Jaſ. & Paul. de Caſt. ubi ſup.

Furthermore if (12) the Teſtator being conſtrained by need [h], as to pay his debts, or to provide him food, or other like neceſſaries [i], do as it were unwillingly alienate the thing by him before bequeathed, this is no ademption of the Legacy [k]; and therefore is the Executor bound to redeem the ſame, or to pay the juſt value thereof to the Legatary: unleſs he prove that the Teſtator did purpoſe by the ſame alienation to take away the Legacy [l]; or unleſs the Legacy were conditionall, and the alienation made before the condition were extant or accompliſhed [m]. But (13) if the Teſtator not conſtrained by neceſſity do of his own accord alienate the thing bequeathed, (as if he giveth the ſame freely [n], or do ſell the ſame of intent to gain thereby [o];) this is an ademption of the Legacy [p]. Which concluſion (14) hath place, al-

[h] L. fidei commiſſ. § ſi rem. ff. de leg. 3. L. rem legatam. ff. de adimen. leg.

[i] Minſing. in § ſi rem. Inſtit. de lega. Berous q. 9. Adde quod ſive neceſſitas ſit ex re familiari, ſive ex lege, utraque impedit præſumptionem revocationis legat. Maſcard. de probac. concl. 1280. n. 126.

[k] d. L. fidei commiſſ. § ſi rem.

[l] d. § ſi rem. Inſtit. de lega. Maſc. de prob. d. concluſ. 1280. n. 127. [m] L. Stichum. ff. de lega. 1. Fald. in L. 3. C. de lega. n. 6. [n] L. rem legatam. ff. de adimen. lega. [o] Berous d. q. 9. [p] Bar. & alii in L. rem legatam. ff. de adimen. leg. & in L. 3. C. de lega.

though

though the gift or alienation be void in Law [q]. For it is ſufficient in laſt Wills, for the revoking of a Legacy, that the Teſtator's meaning do appear even by an act otherwiſe inſufficient [r].

[q] L. legatum. § pater. ff. de adimen. lega. Bar. in L. cum domin. § fin. de pecul. leg. 1. Socin. ſen. conſil. 104. n. 11. vol. 3. Covar. in Rub. de teſta. extra. 2. part. n. 21. Mant. de conject. ult. vol. 1. 12. tit. 6. n. 2. quod locum habet tametſi legatum fuerit expreſſim legatum. Et hæc ſententia verior eſt & receptior, teſtibus Mant. ubi ſupr. Maſcardo de probatione concl. 1280. n. 98. Gabriel. conſ. 103. Idem juris eſt, ſi facta alienatione dominium non ſit tranſlatum. Mant. d. tit. 6. n. 3. Maſc. d. concl. 1280. n. 100. Et licet non deſint magni nominis Interpretes qui in contraria ſtant ſententia; Per. L. prædia. § libert. de Inſt. leg. Falſiſſima tamen eſt horum ſententia, ſi verum dicat Gabr. d. conſil. 103. Tu vero dic ut per D. Gentilem, acutiſſime de hac re diſſer. l. 1. epiſt. c. 10. [r] Covar. in d. Rub. part. 2. n. 21. verb. advert. Graſſ. Theſ. com. op. § legat. q. 78. in fin.

Secondly, this concluſion (15) hath place, although the Teſtator ſhould redeem the thing alienated, the alienation being lawfull †. And therefore if the Legatary ſhould after the death of the Teſtator demand the Legacy alienated and redeemed, his petition were to be repelled, unleſs he did prove a new Will of the Teſtator, or ſome approbation or ratification of the former Will, after the redemption of the thing alienated [t]; or unleſs the Legacy be of freedome from bondage [v], or given to ſome godly or charitable uſe [x]; or unleſs the alienation were neceſſary, not voluntary [y]; or unleſs the Legatary be near of kin or allied unto the Teſtator [z]. In theſe and in ſome other caſes the Legacy redeemed may be recovered, as if the ſame had never been alienated [a]. Peradventure alſo by the Laws of this Realm, (16) Lands, Tenements, and Hereditaments, being firſt deviſed, and after the alienation redeemed, may be recovered, as if the ſame had not been alienated [b]. The (17) reaſon of this law may be, becauſe the alienation doth not defeat the Will, which is not as yet of any force untill the Teſtator be dead [c]. But the reaſon of the Civill Law is, becauſe by this voluntary or unconſtrained alienation, or gift of the thing bequeathed, being an act contrary to the former act of the Teſtator, his will and meaning (which is the life and ſoul of the Teſtament) is ſtraightways preſumed to be changed [d]; and conſequently the Legacy not to be aſleep, (as ſome do dream,) but to be quite dead and extinguiſhed *: and being once dead, cannot eaſily be awaked, but ſtandeth in need of a new conſent or other lively act before it can be revived [f].

† L cum ſervus. ff. de adimen. leg.

[t] d. L. cum ſervus.
[v] L. verum. ff. de teſt. manumiſſ.
[x] Minſing. in d. § ſi rem. Inſt. de leg. Mant. d. tit. 6. n. 6. Maſc. d. concluſ. 1280. n. 112.
[y] Bar. in d. L. cum ſervus.
[z] L. filia. § Titio. ff. de cond. & demon. Maſc. d. concl. 1280. n. 111.
[a] Maſc. d. concluſ. 1280. n. 108, 109, &c. ubi alias videre licet hujus regulæ exceptiones.
[b] Brook Abridg. tit. deviſe. n. 8.
[c] Brook eodem loc.
[d] Aretin. in § ſi rem. Inſt. de leg. Socin. ſen. conſil. 103. in fin.

Maſc. de probac. concluſ. 1280. n. 190. Sich. in L. 3. c. de leg. n. 5. * Sich. in d. L. 3. c. de leg. n. 5, 8. [f] L. cum ſerv. ff. de adim. lega.

If (18) the thing bequeathed be not fully alienated, as if it be pledged or pawned, the Legacy is not thereby extinguiſhed [g]: and therefore the Executor in this caſe is bound to redeem the ſame, and to reſtore it to the Legatary, or to pay the price thereof, if he ſuffer it to be forfeited [h]. Likewiſe, if ſome part onely of the Legacy be alienated the other part not alienated is due, and may be recovered [i]: unleſs it be proved that the Teſtator did mean by alienating part, to take away the whole Legacy [k]. Or if the Legacy be alternative, as if the Teſta-

[g] L. qui poſt. C. de leg. n.
[h] Iſtam concl. limitat & ſublimitat Maſc. de probatione concl. 1280. n. 56, &c. quem velim videas.
[i] Si rem. Inſt. de l. g.
[k] Eod. §. in fin.

tor bequeath ſomething, or the value thereof; the thing being alienated, yet may the value be recovered [l].

[l] Bald. & Paul. de Caſtr. in l. 3. C. de leg.

If (19) the Teſtator do bequeathe an obligation, or a ſum of mony due unto him, and afterwards the debtor unprovoked doth voluntarily pay the debt due unto the Teſtator; the receit of the ſame is no ademption of the Legacy [m]: but if the Teſtator do provoke the debtor to make payment, then by receit thereof the Legacy is extinguiſhed [n]; unleſs the Legatary be able to prove that the Teſtator did not thereby mean to revoke the Legacy [o]: for that peradventure the Teſtator exacting and receiving the money did lay it up, and ſafely keep it for the Legatary [p]; or did utter in words that he did not intend thereby to revoke the Legacy [q]: in theſe caſes the Legacy is not revoked [r].

[m] L. fidei. commiſ. § ſed ſi rem. ff. de leg. 3. Mant. de conject. ult. vol. l. 11. tit. 2. n. 19.

[n] d. § ſed ſi rem. & ibi Bar. & alii. L. pater. ff. de adim. leg. Maſc. de probac. concl. 1280. n. 130.

[o] d. § ſed ſi rem. [p] Eod. § ſed ſi rem. & ibi Bar. in fin. & Bald. circa med. [q] Bar. in d. § ſed ſi rem.

[r] Vid. Maſc. d. concluſ. 1280. n. 132, 133.

Finally, (20) if the Teſtator do bequeath a flock of ſheep, and afterwards the number decreaſing, they become fewer then a flock (a flock conſiſting of ten at the leaſt †,) be it that of all the flock there be left but one; in this caſe the Will of the Teſtator is not preſumed to be altered, nor the Legacy adempted, and therefore that one ſheep is due [t].

† L. ſi grege. ff. de leg. 1. & DD. ibid.

[t] § ſi grex. inſt. de leg.

§ XXI. Of tranſlation of Legacies.

1. *Tranſlation of a Legacy what it is.*
2. *Every tranſlation includeth an ademption.*
3. *What if the perſon to whom the Legacy is tranſferred be incapable thereof.*
4. *Certain caſes wherein tranſlation of the Legacy doth not include an ademption.*
5. *The Legacy is preſumed to be tranſferred with the charge impoſed on the firſt Legatary.*
6. *Certain exceptions of this concluſion.*
7. *One and the ſame thing bequeathed, firſt to one, and after to another, whether it be wholly taken from the former Legatary.*
8. *If in the ſecond diſpoſition there be no mention of the former, it is not wholly taken from the former Legatary.*
9. *If there be mention of the former bequeſt, yet the thing bequeathed is not wholly taken away.*
10. *Certain Limitations of this laſt poſition.*
11. *Difference between theſe words,* I give, *and,* I bequeath.
12. *What if the Legacy conſiſt in quantity?*
13. *What if one ſum be twice bequeathed to one perſon, whether is it twice due?*

Tranſla-

TRanſlation (1) of a Legacy is a beſtowing of the ſame upon another [a]. As Ademption may be made either in the ſame Teſtament or in Codicils, ſimply or conditionally: ſo may Tranſlation of Legacies likewiſe [b].

A Legacy (2) being transferred from one to another, the Legacy is taken away from the former Legatary, albeit (3) the ſecond Legatary be incapable of the Legacy [c]. For howſoever that act is ſaid not to miniſter impediment, which is altogether without effect [d]; yet foraſmuch as by this tranſlation it doth appear to be the Teſtator's will and meaning, firſt to have the Legacy taken away from the former Legatary; this will and meaning ought to be obſerved, ſo far as it may *, and ought not therefore to be hindred in one thing, becauſe it cannot be performed in another [f]. For, as I ſaid before, (4) every tranſlation doth preſuppoſe and include an ademption [g] except in certain caſes following. The firſt caſe is, when the Teſtator in the time of great and extreme ſickneſs transferring a Legacy, or beſtowing the ſame upon another, doth afterwards recover his health: for by this recovery the tranſlation is void, and the former Legacy confirmed [h]. Another caſe is, when the Teſtator having bequeathed a Legacy to one, provideth, that if the Legatary will not doe ſuch a thing to another perſon, that then that other perſon ſhall have the Legacy: in this caſe if the former Legatary be prevented by death, that he cannot perform the condition though he would, the ſecond Legatary cannot obtain the Legacy [i]. The third caſe is, when the Legacy doth conſiſt in quantity, as when the Teſtator doth bequeath to one man an hundred pound, and immediately after to another man an hundred pound: here is neither tranſlation nor ademption of the former Legacy, but two ſeverall Legacies [k]. But yet if the Teſtator do limit this ſum to ſome certain body, as if the Teſtator bequeath to one man a hundred pound which lieth in his cheſt; then it is all one as if he ſaid, he did bequeath his ſignet, his books, or his armour: whereof we ſhall have occaſion to ſpeak ſhortly after [l].

Furthermore, it is to be (5) noted in this place, that where any Legacy is transferred from one to another, it is preſumed to be transferred to the ſecond Legatary with ſuch charge, or upon ſuch condition, as it was left to the former Legatary, albeit in the former tranſlation there be no expreſs mention of any ſuch charge or condition [m]. For example; the Teſtator giveth to one perſon an hundred pound, charging him to diſtribute ten ſhillings yearly amongſt the poor during ten years: afterwards the Teſtator doth beſtow that hundred pound upon another perſon, without mention of any ſuch yearly diſtribution: In this caſe the ſecond Legatary is charged with the yearly payment and diſtribution of ten ſhillings, even as the former Legatary [n], neither can he accept the one part of the Legacy without the other [o], ſaving (6) in certain caſes. One caſe is, if he be able to prove the Teſtator's meaning to the contrary, *viz.* that it was the Teſtator's meaning to transfer and beſtow the Legacy ſimply, without any ſuch charge or condi-

[a] Minſing. in tit. de ademp. leg. inſt. n. 4.

[b] Tit. de ademp. leg. Inſt. L. Tranſlat. cod. tit. ff. & DD. ibid.

[c] L. plane. § 1. de leg. 1. L. & ſi tranſ. de adim. leg ff.

[d] C. non præſt. de reg. jur. 6.

* Minſing. in d. tit. de ademp. leg. n. 6.

[f] Bar. Jaſ. & alii in d. L. plane.

[g] Cæterum an tranſlatio ſit expreſſa vel tacita primileg. revocat. quæſtio eſt, cui non eod. modo reſpond. omnes: tu autem videas Covar. in Rub. de teſt. extr. 2. par. n. 21.

[h] L. Titia. § ult. de adim. leg. ff. Mant. de conject. ult. vol. l. 12. tit. 3. n. 2.

[i] L. ſanc. C. de pœnis. Jaſ. in L. cum proponas. C. de hær. inſt. & Mant. de conject. ult. vol. l. 12. tit. 3. n. 2.

[k] L. paulo. in prin. de leg. 3. ff.

[l] Infra hoc ipſo §. n. 7. 11.

[m] L. Gaio. ff. de alimen. & cib. leg. L. legatum. de adim. leg. Paul. de Caſtr. conſ. 337. vol. 1.

[n] Bar. in d. L. Gaio. Mant. de conject. ult. vol. l. 12. tit. 3. n. 3.

[o] L. legat. § ſi legat. de leg. 1.

condition [p]. Another caſe is, when the condition is ſuch, as the ſame doth cleave to the perſon of the former Legatary [q]. For example; the Teſtator doth bequeath to a woman with child an hundred pound, if ſhe be delivered of a boy: this condition doth cleave to the perſon of the former Legatary, and ſo is it not transferred with the Legacy [r]. The third caſe is, when the tranſlation is made of the ſame perſon without mention of any farther charge or condition: for then, leſt the ſecond bequeſt ſhould ſeem ſuperfluous, it is thought to be the meaning of the Teſtator, by the ſecond bequeſt to give the ſame ſimply *. The fourth caſe is, when in the tranſlation of the Legacy there is a new ſpecial charge impoſed upon the ſecond Legatary: for then the old charge impoſed to the former Legatary is preſumed to be remitted, leſt otherwiſe the latter Legatary is preſſed with a double charge ‖.

What (7) if the Teſtator, after he have given a Legacy to one perſon, do afterwards bequeath the ſame to another perſon? whether is this an ademption of the former Legacy? or whether ought both the Legataries to concur, and to have the Legacy between them?

For anſwer, we are to conſider, whether ſome ſpecial and certain thing is bequeathed, or a thing conſiſting in quantity.

In the former caſe, namely, when ſome ſpeciall or certain thing is bequeathed, it is material, whether the Legacy be of Lands, Tenements, or Hereditaments, and ſo the queſtion determinable in the temporal Court, according to the Laws temporal of this Land; or of Goods, and ſo the controverſy to be decided in the Eccleſiaſtical Court, according to the Laws Eccleſiaſtical of this Realm. If of Lands, Tenements and Hereditaments, as when the Teſtator (for example) doth in the former part of his Will deviſe his Lands in ſuch a place to one in fee, and afterwards in the latter part of the ſame Will to another perſon in fee; it ſeemeth by the Laws of this Realm, that the latter part doth overthrow the former †: and that as the latter Teſtament doth deſtroy the former Teſtament; ſo the latter part of a Teſtament doth infringe the former part of the ſame Teſtament, when it is contrary thereunto [c]. Nevertheleſs, I will not preſume to affirm that this concluſion is undoubtedly certain, but with due ſubmiſſion ſurrender the ſame to be diſcuſſed by the learned in the Laws temporal, unto whom it rightly appertaineth.

If the deviſe be of Goods, as when the Teſtator doth bequeath his ſignet, his books, or his horſe, &c. firſt to one perſon, and afterwards to another perſon; then (8) in caſe the ſecond Legacy be ſimple, (I mean without mention of the former,) the former Legacy is not taken away, but the two Legataries concurring, ought to divide the Legacy betwixt them [v]. The reaſon and foundation whereupon this concluſion is builded is the Teſtator's conſtancy; wherein the Civill Law doth repoſe ſuch confidence, that when he hath once bequeathed a thing, he is not preſumed to take the ſame away [x], without evident preſumpti-

[p] d. L. Gaio.

[q] L. legat. ſub conditione. de adimen. leg. L. legatum ſub conditione. de cond. & demon. ff.

[r] d. L. legat. ſub conditio. de adim. leg. & ibi DD.

* Si tibi. de adim. leg. ff.

‖ L. Alumne. de ad. Paul. de Caſtr. conſ. 427. vol. 1. Manſ. de conject. ult. vol. l. 12. tit. 3.

† Plow. in caſ. inter Paramor & Yardley, f. 541.

[c] Eadem enim eſt ratio partis ad partem, atque totius ad totum. Everard. loc. top. à toto ad partem.

[v] Paul. de Caſtr. Jaſ. & Zaſ. in L. ſi plurib. ff. de leg. 1. Ripa in L. re conjuncti. n. 21. de leg. 3.

[x] d. L. ſi pluribus. verb. ſi quidem evidentiſſime.

on y

on [y] of the alteration of his former reſolution. Inſomuch that if one and the ſame thing be left to one perſon in the Teſtament, and to another in the Codicill, yet is not the Teſtator preſumed ſo variable, as utterly to take away the former Legacy, but rather that both the Legataries are to concur, and ſo to divide the Legacy betwixt them [z]. Where it is ſaid, that as the latter Teſtament doth deſtroy the former Teſtament, ſo likewiſe the latter part of the Teſtament doth overthrow the former part thereof: that is true, when it is evident that the Teſtator did mean it ſhould be ſo [a]. But if it be doubtfull, then without all doubt we ought to labour diligently to ſave the Teſtament from contradiction [b], and not ſuffer one part to fight and brawl with another; much leſs to permit one part to kill and deſtroy another, in caſe there be any place for peace, or hope of reconciliation to be had betwixt them. Again, the argument is not of equall force *à parte ad partem*, with the agreement *à toto ad totum*, in caſe there be inequality or diverſity of reaſon betwixt the one and the other [c], as in this caſe. For, ſay that ſuch is the force of poſteriority in Teſtaments, that the latter doth ſtill deſtroy the former [d], without any other revocation *: ſay and think that the life of the latter Teſtament is evermore the death of the former Teſtament, even becauſe it is the latter [f]: yet how can it be thereby juſtified, that the latter part of a Teſtament doth deſtroy the former part, whereas neither part doth receive any life before the other [g]? for untill the whole Teſtament be completed, the parts thereof are as the ſenſeleſs parts of an unperfect creature, or confuſed *Embryo* [h], and do receive their life too altogether at one inſtant; namely, when the Teſtator having finiſhed his Teſtament, doth approve the ſame for his laſt Will, and not before [i]: like as they do receive their ſtrength all at one moment, namely, at the death of the Teſtator, and not before; at which time the foreſaid *Embryo* being now grown to a perfect child, is then brought into the world when the Teſtator did depart out of the world [k].

[y] Raph. Cum. in d.L. ſi plurib.& ibi Jaſ. n. 12. & 13.& Zaſ.n.14. Qui omnes tenent, ſufficere conjecturalem probationem,non obſtante qd. Textus exigat evidentiſſimam. Quinimo,probatio vel ex conjecturis emergens, dicitur evidentiſſima in tranſlatione legator. Jaſ. ubi ſupr. poſt Bar. in L. ſi conſt. ff.ſol.ma. n. 12.

[z] Bald. in L. cohær. § cohæres, in fin. de vulg.& pud.ſub.ff.Alex.conſil.169. vol.5. Mant. de conject. ult. vol.l.12.tit.2.n.3.

[a] d. L.ſi plurib. & ibi DD.Mant. de conject. ult. vol.l. 2.tit.2.n.3. in fin.

[b] Mant. de conject. ult.vol.l.3.tit.5. Soc. Jun.conſ. 125. vol.1. n. 5.

[c] Everard. d. loco à toto ad partem, n. 5. poſt.Cyn.& alios leg. interpretes in L. cum notiſſimi. § in his. C. de præſcrip.30.an.

[d] § poſterior. Inſt. quib.mod.teſt. infir.

* Vigl. & Minſing. in d. § poſterior.

[f] Graſſ. Theſ. com. op. § teſt. q. 86. in princ. & ſupra eadem part. § 14. [g] Bar. in L. ſi quis. ff. de teſta. L. ex ea ſcriptura eodem tit. [h] d. L. ex ea ſcriptura. Imo (inquit Text.) teſt. imperfectum eſt ſine dubio nullum. § pen. Inſt. quib. modis teſta. infir. [i] Jul. Clar. § teſt. q. 7. in fin. [k] Chr. Porcus § in extraneis. Inſt. de hær. qual. & different. Matth. de celebr. miſſ. extra.

If (9) the ſecond bequeſt be qualified with mention of the former, for example, the Teſtator ſaith, *My ſignet which I bequeathed to A. B. I bequeath to C. D.* whether in this caſe the former Legacy be quite taken away, or in part, is a queſtion wherein the Writers do greatly vary [l]: but the greater number incline to this opinion, that the former Legacy is not wholly taken away, but that they are both joynt Legataries [m]; (10) except in certain caſes. One is, when it may appear

[l] Id quod patet per Mant.de conject. ult. vol.l 12.tit.4.per Covar. in Rub. de teſt. extra parr. 2.per Gr. Theſ.com.op. § legatum.q 8.per Vaſq.de ſucceſſ.progreſſ.l. 3. § 23. n.96, &c. & per Doctores in L. plane. & L.ſi pluribus.ff.de leg. 1. [m] Bar. in L. re conjunct.ff.de leg.3. Cujus opinionem frequentiori calculo receptam monſtrat nobis Mant. de conject. ult. vol.l. 12. tit. 4. n. 1. & refert Graſſ. Theſ.com.op. § legatum, q. 180.

(at leaſt by conjectures) that it was the Teſtator's meaning to take away the former Legacy from the former Legatary wholly [n]. Another is, when the ſecond bequeſt is not made in the ſame Teſtament, but after in ſome Codicil [o]. Another caſe is, when the Teſtator in the ſecond diſpoſition ſaith, (11) that which I did bequeath to A. B. I give to C. D. for this word [*give*] is of ſuch force, that it ſeemeth wholly to take away the former Legacy [p].

In the ſecond caſe, that is to ſay, (12) when the Legacy doth conſiſt in quantity, if the Teſtator do bequeath to one man an hundred pound, and immediately to another man an hundred pound; here is neither tranſlation nor ademption, but two ſeverall Legacies: and either Legatary in this caſe ſhall recover an hundred pound [q], as I have ſhewed before. Where alſo I ſignified, that if the Teſtator do reſtrain this quantity to a certain body, as to the hundred pound ſealed up in ſuch a bag, then it is reduced to that caſe of bequeathing a certain ſpeciall thing, as the Teſtator's ſignet, firſt to one, and then to another [r].

If the Teſtator (13) do bequeath to one man an hundred pound, and afterwards in the ſame Teſtament bequeatheth to the ſame man an hundred pound; the ſecond diſpoſition is underſtood to be but a repetition of the former, and all but one Legacy †: wherefore the Legatary in this caſe can recover but one hundred pound; unleſs he make proof that it was the Teſtator's meaning, that he ſhould have two hundred pound [t]. Or unleſs an unequall quantity be given to the ſame Legatary; as if the Teſtator do bequeath in one part of his Teſtament an hundred pound, and in another part fifty pound: for in this caſe the Legatary may recover an hundred and fifty pound [v]. Or unleſs where two equal ſums be left to one perſon, the one quantity were left in one writing, and another quantity in another writing, ſuppoſe one hundred pound in the Teſtament, another hundred pound in the Codicill: for here the Legatary may recover two hundred pound [x], as two ſeverall Legacies; except the Executor prove the Teſtator's meaning to be contrary [y].

[n] Bar. in d. L. re conjunct. Mant. d. tit. 4. n. 8. Graſ. d. § legatum. p. 80. n. 2.

[o] Ripa in d. L. re conjunct. n. 23. de leg. 3. ff. Mant. d. tit. 4. n. 10.

[p] Cov. in Rub. de teſt. extr. par. 2. n. 21. Alc. in L. triplici. de ver. ſig. ff. n. 13. Maſc. tract de prob. concl. 1280. n. 47.

[q] Atque hæc concl. ſine contradict. vera eſt. Minſ. in § transferri. Inſt. de ademp. leg. n. 8.

[r] L. plane. § ſi ead. de leg. 1. ff. ver. ſed hoc. ita & Zaſ. eod. § n. 3. verb. ſed finge.

† Cleſſ. in d L. plane. § 1. & ibi Jaſ. n. 11. & Zaſ. n. 14. Michael Graſ. Theſ. com. op. § legat. q. 60. Contra quam opinionem, quantumvis communem, emanavit diſputatio à D. Gentil. condita, non inelegans, nec injucunda. Hanc ipſe legit l. diſput. fo. 51.

[t] Tunc enim ſæpius præſtandaeſt ſumma, ſi modo evident. probationibus oſtendatur teſt. mult. leg. voluiſſe. d. § 1.

[v] L. cum centum. de adimen. leg. ff. Jaſ. in d. § 1. Graſ. d. q. 60. ubi ſcribit hanc op. eſſe com. Adde Vaſq. de ſucceſſ. progreſſ. § 11. n. 10. Menoch. de præſ. l. 4. præſ. 128. fol. 1297. n. 9.

[x] Jaſ. & Zaſ. in d. L. plane. § ſi eadem. de leg. 1. & hæc op. com. eſt, ut per eoſdem Doctores, & per Graſ. d. § legatum. q. 60. & per Ripam d. L. conjunct. de leg. 3. ff.

[y] Minſing. in tit. de adem. legat. Inſt. n. 8. Si ob eandem cauſam quantitas ſit uni in diverſis ſcripturis relicta, (puta alimentorum cauſa centum relicta ſunt,) illa centum tantum ſemel præſtari debent. Menoch. præſump. lib. 4. præſ. 128. n. 14.

§ XXII.

§ XXII. Of divers means whereby Legacies are loſt conſiderable in the Legatary.

1. *By what means he that is named Executor is made incapable of the Executorſhip, by the ſame means doth the Legatary loſe his Legacy.*
2. *The Legacy is loſt by reaſon of enmity betwixt the Teſtator and the Legatary.*
3. *Divers extenſions of this concluſion.*
4. *What if the Teſtator were the cauſe of the enmity, and the Legatary in no fault?*
5. *Certain Caſes wherein the Legacy is not loſt by reaſon of enmity.*
6. *The Legatary being appointed Tutor, loſeth his Legacy if he refuſe the Tutorſhip.*
7. *The Legatary, if he accuſe the Teſtament of falſity, loſeth his Legacy.*
8. *The Legatary which doth cancell the Teſtament doth loſe his Legacy.*
9. *The Legatary doth loſe his Legacy, who of his own authority doth take and poſſeſs the thing bequeathed.*
10. *Certain caſes wherein the former concluſion is limited.*

IN reſpect of the fact and perſon of the Legatary, the Legacy may become void divers waies. And firſt generally, (1) by all the means above recited whereby the Executor is made incapable of the Executorſhip [a]. As if the Legatary do become an Heretick, an Apoſtata, or do forbid the Teſtator to alter his Will, *&c.* of all which means we have ſpoken already [b]; wherefore we ſhall let them paſs, and deſcend to ſome particular cauſes not yet mentioned.

Firſt therefore, if the (2) Legatary become enemy to the Teſtator, he loſeth his Legacy [c]. For beſides that he ſeemeth unworthy of a benefit at his hands, whom he doth offend and injure; it is not likely that the Teſtator would that that perſon, which doth perſecute him with hatred and enmity whiles he liveth, ſhould reap any commodity by his Teſtament when he is dead [d]. And therefore if the Teſtator's enemy ſhould demand any Legacy, he might juſtly be repelled, by reaſon of the defect of the Teſtator's will and conſent *: which conſent is the life and ſoul of the Teſtament.

The (3) Extenſions of this concluſion are theſe. Firſt, albeit the Teſtator do afterwards make ſome Codicill, or additions to his Teſtament, and do not therein expreſly revoke the Legacy before bequeathed in his laſt Teſtament; yet is it ſtill preſumed to be revoked ſecretly, and in the intent of the Teſtator, by reaſon of the aforeſaid hatred or enmity [f].

[a] Gloſſ. in L. 3. § fin. de adimen. leg. ff. L. ex part. eod. tit. Mantic. de conject. ult. vo. l. 12. tit. 4. n. 2.

[b] Supra part. 5. §§ 2, 3, 4. cum ſeq. & ſup. ead. part. § 18.

[c] L. 3. § fin. de adimen. leg. ff. Tiraq. in reg. ceſſante cauſa. n. 127. Mant. de conject. ult. vol. l. 12. tit. 5. in princ.

[d] L. ſi inimicitiæ. ff. de his quib. ut indig. L. nec adjecit. ff. pro ſocio. Maſc. de prob. concl. q. 1289. n. 137. * DD. in L. ſi inimicitiæ. & in d. § fin.

[f] L. filio. § ſcia. & ibi Bar. de adimen. leg. ff. Rip. in L. ult. de revoc. don. C. Mant. de conject. ult. vol. l. 12. tit. 5. n. 2. Maſ. de pro. concl. 1280. n. 138.

Secondly, the former conclusion hath place, albeit the Testator were ignorant of the injury done unto him by the Legatary, when it is such an injury, for the which it is very likely that the Testator would have revoked his Legacy, if he had known thereof: as if the Legatary have committed adultery with the Testator's wife, or have deflowred his daughter [g].

[g] Gloss. in L. fidei commiss. C. de fidei commiss. Mantic. de conject. ult. vol. l. 12. tit. 5. n. 6. Et quid ipso jure tollitur legatum, si vivente testatore stupravit ejus uxor. eo vero defuncto, ope exceptionis. Apost. ad gloss. in d. L. fideicom.

Thirdly, if the wife divert or depart from her husband without his good favour, she loseth her Legacy [h].

Fourthly, he which doth accuse the Testator of any capital crime loseth his Legacy [i].

Fifthly, he which becometh capital enemy to the Testator's brother loseth his Legacy [k].

Sixthly, (4) albeit the Testator himself were the cause of the enmity, and the Legatary in no fault, yet shall the Legatary lose his Legacy [l]. Which conclusion may seem hard, but the reason is easie; namely, because where the Testator hath conceived enmity, there is he presumed to have altered and revoked his Will [m]: which alteration and revocation is so much the rather presumed, when the Testator himself is the cause of the enmity; for he that will be enemy without a cause, is less a friend then he that is unwillingly made an enemy. And therefore I do the rather encline to their opinion, which hold that the Legacy is taken away by enmity arising from the Testator, without any just cause given by the Legatary. If any think that this opinion doth favour more of law then of equity; let him yet consider that even in equity the Legatary, although innocent, ought not to receive any favour against the will of the Testator [n]. At least, howsoever the Legatary were in no fault at the first, if at the last being provoked by the Testator he become his enemy, seeking to be revenged for the injury done unto him; in this case he loseth his Legacy, even as well as if he himself had first broken the bond of amity [o].

[h] L. uxori. de aur. & argent. leg. ff. & ibi gloss. cum Bar. Mast. de prob. concl. 1280. n. 140. Mant. d. tit. 5. n. 3.

[i] L. filio. § se. ff. de adimen. leg.

[k] Mant. de conject. ult. vol. lib. 12. tit. 5. n. 8.

[l] Mant. d. tit. 5. n. 9. Jas. in L. si filiam. C. de inoffic. test. Ripa in L. ult. C. de revoc. don. n. 151. Covar. in Rub. de test. extr. p 2. n 19. versic. 5. in fin. contra opinionem Bar. à multis olim quidem receptam (quorum diligenter meminit Cotta in causa sororis suæ, asseverans eam esse communem, in memorabilibus. verb. inimicitiæ) sed hodie magis communiter reprobatam, ut refert Mascard. de probac. concl. 1280. n. 144. [m] Mant. d. tit. 5. n. 9. L. 3. § ult. de adimen. leg. ff. [n] Dec. consil. 426. Mant. de conject. ult. vol. l. 5. tit. 19. n. 11. [o] Mascard. de prob. concl. 1280. n. 145. qui hoc distinctionis fœdere contrarias opiniones conciliat.

Seventhly, if the Legatary did neglect to minister necessary help to the Testator in time of his sickness, whenas he might easily have done the same, through the want whereof the Testator died; the Legacy is lost [p]. For whoso looketh to be benefited by a man's death, he ought to beware that he be not the occasion thereof, either in committing or in omitting any thing, contrary to the rule of piety and charity [q].

Eighthly, if the Legatary by injurious and contumelious words do grievously defame and slander the Testator, or curse him with wicked speeches; in these and such like cases the Legacy is lost [r].

The (5) Limitations of the former conclusion are these. First, when the enmity is not great and grievous, but small and light †. For the

[p] L. indignum. ff. de his quibus ut indignis.

[q] Mant. d. tit. 5. n. 10. Mascard. concl. 1280. n. 134, 135.

[r] L. si inimicitiæ. ff. de his quibus ut indignis. Mant. d. tit. 5. n. 11. quem velim te videre.

† L. 3. § ult. de adimen. leg. 1. si inimicitiæ. de his quibus ut indig. ff.

Testator

Teſtator is not preſumed to have altered or revoked any part of his Will and Teſtament made with deliberation and conſtancy, by reaſon of any light offence or ſmall diſpleaſure: but then whenas the Teſtator is moved and ſtirred as it were with violence of great diſpleaſure, and thereby driven to ſuch bitterneſs of mind againſt the Legatary, that it may ſeem that it repented the Teſtator that he had bequeathed any thing in his Teſtament to ſuch a Legatary [t].

Secondly, when the Legacy is left in reſpect of the good deſert of the Legatary [v]. For where deſert went before, the Legacy is not preſumed to be taken away by the offence following [x]; at the leaſt if the offence be not very great and hainous, ſuch as may be thought to alter a man's purpoſe, even againſt him that had well deſerved [y].

Thirdly, when the Teſtator and Legatary be reconciled and reduced into friendſhip again; for then the former enmities do not prejudice the Legatary [z]. Not onely by reaſon of enmity betwixt the Teſtator and the Legatary during the Teſtator's life; but alſo by other occaſions after the Teſtator's death, conſiderable likewiſe in the perſon of the Legatary, the Legacy may be loſt.

If (6) the Legatary being appointed Tutor in the Teſtament, or charged by the Teſtator with the bringing up of ſome child, do refuſe to undergo the charge, he loſeth his Legacy [a]. Which concluſion proceedeth, whether he were appointed Tutor either in the ſame Teſtament wherein the Legacy is contained, or in ſome Codicill, the Legacy being contained in the Teſtament [b]; or whether he were appointed by the father of the child, or by any other having authority to appoint a Tutor [c], (of whom we have ſpoken before [d];) or whether the Legacy were left conditionally, (*viz.* If he did undertake the Tutorſhip,) or ſimply *; or whether the Tutor appointed be of kin or allied to the Teſtator, or no [f]. But the ſaid concluſion faileth, when the Legatary would be Tutor, but cannot [g]; or when it doth not ſtand by the Legatary that he is not admitted Tutor [h]; or if by other circumſtances it may appear that the Teſtator would that he ſhould have the Legacy, albeit he did not undertake the Tutorſhip: In which caſe the Tutor not being moniſhed to undertake the Tutorſhip, doth not loſe his Legacy [i].

[t] Mant. d. tit. 5. n. 14. Zaſ. tract. de ſub. c. 2. col. pen. Jaſ. in l. ſi filiam. C. de ineffic. teſta.

[v] Maſc. de probac. concl. 1280. n. 147. Ripa in § ult. C. de revoc. don. n. 150.

[x] L. ſi pater. § pen. ff. de donac. Bald. in L. ſi cum tibi. ff. de dolo. Mant. d. tit. 5. n. 17.

[y] Mant. ubi ſupr. vide Maſcard. d. concl. 1280. n. 148.

[z] L. 4. de adim. leg. ff. Graſſ. Theſ. com. op. § legat. q. 78. Maſc. d. concl. 1280. n. 149.

[a] l. poſtlegat. ver. amittere. ff. de his quibus ut indignis.

[b] L. Ne ſenſ. juncta. L. ſeq. de excuſ. tut. ff.

[c] d. L. Ne ſenſ. L. natur. de confir tut. ff. & ibi Bar. L. ſi patronus. eod tit. & ibi Bal.

[d] Supra 3. part. § 9. cum ſequen.

* L. ſed hæc. ff. de excuſ. tut. Gribald. Theſaur. com. op. verb. tutor.

[f] Grib. de verb. tutor. Bar. Jaſ. Sichar. & alii in L. ſi legatar. C. de lega. Et iſta opinio communis eſt jure Authen. pr. § his omnibus. de hær. & falcid. refragante Covar. in C. Johann. de teſta. extra. Sed diſtingue, ut per Alex. & alios in d. L. ſi legatarius.

[g] DD. in d. L. ſi legat. C. de lega.

[h] L. cum filius. § non jure de leg. 2. ff.

[i] Alex. & Sich. in d. L. ſi legatarius. C. de lega.

Item, if (7) the Legatary after the death of the Teſtator do accuſe the Teſtament as a falſe Teſtament, he loſeth his Legacy therein bequeathed [k]: unleſs he being Tutor to the Teſtator's children, or to ſome other having intereſt that the Teſtament ſhould not take place, doth proſecute the cauſe againſt the Teſtament, not in his own name but as Tutor, or for the behoof of the Pupill [l]; or unleſs he accuſe the Teſtament, not as a falſe Teſtament, but as unlawfully made [m]; or unleſs he

[k] L. poſt legatum. de his quibus ut indig. ff.

[l] L. tutorem. ff. de his quib. ut indig.

[m] L. pen. eod. tit. Ædiologia eſt, quia [illegible] judicium defertur impugnatæ quam de jure [illegible]

he deſiſt from the ſuit before ſentence be given [n]: In theſe and divers like caſes he doth not prejudice himſelf [o].

[n] Sich. in Rub. de his quib. ut indignis. C. n. 7. per L. 2. & per L. aliam cauſam eod. tit. [o] Doctores in c. ex eo. de reg. jur. 6. Gabr. l. com. concl. l. 6. tit. de reg. jur. concl. 1. Vig. method. jur. civil. lib. 12. c. 8. cauſ. 17.

Item, if (8) the Legatary cancell or deſtroy the Teſtament, he loſeth his Legacy [p]. And ſo it is, though he do not deface the Teſtament, but maliciouſly and fraudulently conceal the ſame [q].

Item, if (9) the Legatary of his own authority, without the conſent of the Executor, do apprehend and occupy the Legacy to him bequeathed, he loſeth his right and intereſt thereunto [r]. For he may not be his own carver in this caſe, but ought to receive his Legacy at the hands of the Executor †: which Executor ought firſt to have all the Teſtator's goods and chattels in his hands, for the payment and diſcharge of the Teſtator's debts [t]; which debts ought to be payed before Legacies [v].

[p] L. ſi quis cum falſo. § divus. L. ſi quis patris. Ad 1. L. Cornel. de falſis. ff. [q] L. ſi legatarius. C. de lega. [r] L. 1. quorum legatorum. ff. L. non dubium. C. de lega. † Sich. in d. L. non dubium. Peckius tit. teſtam. fol. 94. [t] Old de action. claſſ. 2 action. 2 fol. 112. Peckius ubi ſupra. Caſtr. & Sichar. in d. L. non dubium. aſſignantes aliam rationem, nempe ob detractionem falcidiæ. [v] L. ſcimus. C. de jure delib. Paul. de Caſtro in d. L. non dubium. Brook Abridg. tit. deviſ. n. 6. Fulbeck fol. 47.

The (10) Limitations of this former concluſion are theſe. Firſt, when the Teſtator doth in his Teſtament give licence to the Legatary to take and occupy the ſame without delivery of the Executor [x]. Which licence may be granted either expreſly or ſecretly [y]. Expreſly, when the Teſtator ſaith, I bequeath my horſe to A. B. giving him licence to take him, and to poſſeſs him of his own authority, without any delivery to be made by my Executor [z]. Secretly, when the Teſtator ſaith, I bequeath unto him my horſe, which I will that he quietly enjoy without trouble or moleſtation [a]; or by words of like importance [b].

The ſecond limitation is, when the Legatary was in quiet poſſeſſion of the thing bequeathed at the time of the death of the Teſtator; in which caſe, if there be ſufficient goods to pay the Teſtator's debts, he may ſtill retain the Legacy [c].

The third limitation is, when the Executor doth willingly permit the Legatary to take and occupy the Legacy without contradiction [d].

The fourth limitation is, when the Legatary doth apprehend his Legacy before the Executor have proved the Will, and undertaken the Executorſhip *, or before Adminiſtration be granted [f].

[x] Bar. in L. Titia. § Lucius. de leg. 1. Rip. in L. 1. quorum lega. ff. Sich. in d. l. non dubium. C. de lega. [y] Sich. in d. L. non dubium. Rip. in d. L. 1. [z] Sichard. in d. L. non dubium. n. 11. [a] Sichar. in d. L. non dubium. n. 12. [b] Ripa in d. L. 1. ff. quorum lega. n. 10, 11, 12, 13, 14. [c] Socin. conſil. 111. lib. 1. Ripa in d. L. 1. n. 15. Olden. de action. claſſ. 2. action. 2. fol. 113. [d] L. 1. § prodeſt. ff. quorum leg. * Paul. de Caſtro in d. L non dubium. Ratio eſt, quia vacante hæreditate, legatarius non dicitur vitioſe occupare. [f] Forte tamen cenſuris eccle. puniendus eſt, per Leg. unic. de bonis inteſtatorum.

The fifth limitation is, when the Executor is negligent, and the Legacy like to periſh; as when certain fruits or corn on the ground are given, and the ſame ready for reaping [g].

[g] Jaſ. in d. L. non dubium. in fin.

The

The ſixth limitation is, when the Legatary is ignorant that the thing by him apprehended and poſſeſſed was bequeathed unto him [h].

The ſeventh limitation is, when the Legatary is alſo Executor [i].

The eighth caſe is, when any Legacy is bequeathed to good and godly uſes *.

The ninth caſe (by the Laws of this Realm) is, where a thing certain is deviſed, which cannot but be known to the Legatary. For in this caſe, he may enter to the Legacy without livery of the Executor †. whereas if the Legacy were not certain, he could not enter thereunto without danger of loſs of the Legacy ‖. But in theſe and other caſes the Legatary doth not loſe his Legacy [k]: albeit (if need be) he may be compelled to reſtore the ſame [l].

[h] Sichard.in eand. L. non dubium.n.1.
[i] Sichard.ibid.n.13.
* Tiraq. de privileg. piæ cauſæ, c.45.
† Kelleways Reports, fol.118.n.93.
‖ Kelleway ubi ſupr.
[k] Old.de action.claſ. 2. action. inderdict. quod legator.fo.109.
[l] d. L.1. quorum legatorum.& ibi Zaſ.& Ripa d. L. non dubium.& ibi Jaſ.& Sich.

§ XXIII. Of the death of the Legatary before the Legacy be due.

1. *If the Legatary die before the Legacy be due, the Legacy is extinguiſhed.*
2. *A ſimple Legacy beginneth to be due at the death of the Teſtator.*
3. *What if the Legatary die at the ſame inſtant when the Teſtator dieth.*
4. *If the Prince die before the Teſtator, his Succeſſors may obtain the Legacy.*
5. *A conditional Legacy is not due before the condition be extant.*
6. *If the Legatary die before the condition be extant, the Legacy is not transferred to his Executors.*
7. *Extenſions of this former concluſion.*
8. *Limitations of the ſame concluſion.*
9. *If the Legacy be referred to a certain day, whether it begin to be due at the death of the Teſtator.*
10. *When the day is utterly uncertain, the Legacy is as if it were conditional.*
11. *What if the day be certain in ſome reſpects, and uncertain in other reſpects?*

IF (1) the Legatary die before the Legacy be due, the Legacy is extinguiſhed [a]. That we may know when the Legacy is due, we are to conſider, whether the ſame be pure and ſimple, or conditional, or referred to a day [b].

When (2) the Legacy is pure and ſimple, the day wherein the Legacy beginneth to be due is the day of the death of the Teſtator [c]: and therefore if the Legatary die before that day, the Legacy is void; neither can the Executors or Adminiſtrators of the Legatary demand the ſame [d]. Inſomuch that if the Teſtator by his laſt Will do bequeath his lands and tenements to J. S. and to his heirs; yet if J. S. die before the Teſtator, the deviſe is meerly void, by the death of J. S. before the Teſtator;

[a] L.ſi poſt.ff. quando dies.leg.ced.
[b] Gloſſ. in Rub. de cond. & dæmon. ff. Graſſ.Theſau.co. op. § legat.q.43. in prin.
[c] L. unic.§ cum igitur.& §in noviſſim.C. de cad tollend.
[d] d. L. unic. § cum triplici.

ſtator; and ſo the heirs of the ſaid J. S. cannot recover the land by force of the Will †. And (3) ſo it is although the Legatary live as long as the Teſtator. For if he do not over-live the Teſtator, but that they die both at one inſtant, (both peradventure being drowned together, or both being ſtruck to death with the fall of an houſe ‖;) in this caſe alſo the Legacy is not due *, and conſequently not tranſmiſſible to the Executors or Adminiſtrators of the Legatary. But if the Legatary do over-live the Teſtator, though it be but a very little, even a moment, then the Legacy is due [f], and ſo may be recovered by the Executors or Adminiſtrators of the Legatary [g]. Neither is it material whether the Legatary did know, or were ignorant [h] of the Legacy; or whether the Will were proved, or the Adminiſtration of the goods committed, whiles the Legatary lived [i]: for in this caſe alſo the ſame is due to his Executors or Adminiſtrators. Howbeit (4) the former concluſion, that if the Legatary die before the Teſtator, the Legacy is extinguiſhed, doth not proceed where any thing is bequeathed to the Prince: for though the Prince die before the Teſtator, yet the Legacy is due to the Prince's ſucceſſour [k].

When (5) the Legacy is conditional, the day wherein the Legacy beginneth to be due is the day wherein the condition is performed or extant [l]: and therefore (6) the rule is, that the Legatary dying in the mean while, before the condition be extant, the Legacy is extinguiſhed [m]. Which rule (7) is extended, although the Legatary were one of the Taſtator's children [n].

† Plowd. in caſu inter Brett. & Rig. Do. Coke l. 11. in Rector de Cheddingtons caſe.
‖ Duobus ſimul mortuis, bello, ruina, naufrag. uter præſumitur prius mortuus. Menoc. de præſump. l. 6. præſ. 50.
* L. quod. ff. de reb.
[f] Caſtr. in d L. quod Tiraq. de jud. in reb. exig. lim. 3. nec longe abeſt Jaſ. L. ſi quis C. de inſtit. & ſub. n. 5.
[g] L. ſi poſt diem. ff. quando dies leg. ced.
[h] L. ult. quando dies leg. ced. ff.
[i] L. unic. § Sin autem. C. de cad. tollen. Dier fol. 367. 372.
[k] L. quod princ. ff. de leg. 2.
[l] L. unic. § ſin autem. C. de cad. tol. Bar. in L. ſi poſt. ff. quando dies leg. ced.
[m] L. intercidit. ff. de cond. & dæmon. & Bar. progreſſ. l. 3. § 19. n. 20. n. 1.
[n] Gloſſ. in L. unic. de his qui ante aper. tab. C. Vaſq. de ſucceſſ. in d. L. ſi poſt diem. 19. quæ opinio communis eſt, ut latius per Mantic. de conject. ult. vol. l. 11. tit.

Item, although the condition were referred to the Will of the Legatary. For example, the Teſtator giveth to A. B. an hundred pound if he will: for in this caſe alſo, if the Legatary die before he have declared himſelf willing, the Legacy is extinguiſhed [o], and ſo nothing is due to his Executors or Adminiſtrators. Likewiſe, if the condition be alternative, whereof one part is ſimple, and the other conditional, if the Legatary die before the condition be extant, the Legacy is utterly void [p]. For example; the Teſtator doth bequeath to A. B. all his plate, or, if his wife have a child, an hundred pound: albeit A. B. do overlive the Teſtator, but die before his wife have a child, the Executors or Adminiſtrators of the Legatary can neither obtain the hundred pound, nor the plate [q].

Limitations (8) of this former rule are many [r]. Firſt, when it is the Teſtator's will and meaning, that the conditional Legacy be tranſmitted †.

Secondly, when it doth not ſtand by the Legatary wherefore the condition is not performed, and in that reſpect the condition is reputed for accompliſhed [t].

[o] L. ſi ita. § ſi illi. de leg. 1. ff.
[p] L. cum illud. ff. quando dies leg. ced.
[q] D. in d. L. cum illud. Ætiologia eſt, quia in alternativis non ſunt duo legata, ſed unum.
[r] Vigel. method. jur. civil. part. 4. l. 13. c. 7. except 2. Vide Manr. l. 20. tit. 11.
† Vaſq. de ſucceſſ. progreſ. l. 2. § 18. n. 94. lib. 3. § 29. n. 16. Bar. in L. ſi is cui. § hoc autem. de leg. 1. in fin.
[t] C. cum non ſtat. de de reg. jur. 6. plenius ſupra part. 4. § 8.

Thirdly,

Thirdly, when the Legacy is not conditional, but modal [v]. (Of which difference we have ſpoken before [x].)

Fourthly, when the Legacy, which was firſt conditional, is afterwards repeated without any condition [y].

Fifthly, when the Teſtator doth give the Legacy upon condition afterwards to be expreſſed, but expreſſeth none [z].

Finally, whereſoever the condition doth not make the Legacy conditional, (either becauſe it is ſecretly included [a] in the diſpoſition, or rejected [b],) it doth not hinder the tranſmiſſion of the Legacy to the Executors or Adminiſtrators of the Legatary deceaſed, no more then if it were a ſimple and pure Legacy.

When (9) the Legacy is referred to a day, then it skilleth whether the day be altogether certain, or altogether uncertain, or in ſome reſpect certain, and in other reſpect uncertain.

In the firſt caſe, that is to ſay, when the day is certain, the Legacy beginneth to be due at the time of the death of the Teſtator, although it cannot be demanded effectually before the day do come [c]. And therefore if after the death of the Teſtator, the Legatary die alſo before the day of payment, the Legacy is tranſmitted to the Executors or Adminiſtrators of the Legatary, as if it had been a pure and ſimple Legacy [d]. For example; the Teſtator doth bequeath to A. B. an hundred pound at Eaſter, *anno Domini* 1600. and afterwards dieth, and after him the Legatary dieth alſo before Eaſter *anno* 1600. in this caſe the Executors or Adminiſtrators of the Legatary at Eaſter 1600. may demand and recover the Legacy; becauſe the time is undoubtedly certain (in the reputation of law) as well in reſpect of the queſtion *when*, as in reſpect of the queſtion *whether* *.

In the ſecond caſe, that is to ſay, when (10) the day is utterly uncertain, the Legacy is compared to a conditional Legacy [f]; and therefore if the Legatary die in the mean time, the Legacy is loſt, without hope of devolution thereof to the Executors or Adminiſtrators of the Legatary deceaſed [g]. For example; the Teſtator ſaith, I do bequeath to A. B. an hundred pound when he ſhall be married; or thus, I bequeath to A. B. an hundred pound to be payed when he ſhall be married: here the day is utterly uncertain; for neither is it certain *when*, neither yet *whether* the Legatary ſhall marry before the event. And therefore if the Legatary die before he be married, his Executors or Adminiſtrators have no action or right to demand the Legacy [h]. Neither is it material, whether the day be joined to the ſubſtance of the Legacy, as in the former example, or to the execution thereof, as in the ſecond example: for it is not devolved either in the one caſe or in the other [i]. But if the Teſtator bequeath to A. B. an hundred pound for and towards her marriage, and ſhe die before marriage, yet is the Legacy due to her Executors or Adminiſtrators †.

[v] L. cum tale. ff. de cond. & demon.

[x] Supra part. 4. § 9.

[y] L. non ad ea. ff. de cond. & demon. & Caſtr. ibid.

[z] L. plen. C. de inſtit. & ſub.

[a] L. ſi dies. § ult. ff. quando dies leg. ced. Mant. de conject. ult. vol. l. 2. tit. 20. n. 5.

[b] L. conditiones. de condic. Inſt. ff. § impoſſibilis. Inſtit. de hæred. inſtit. & ſupra §§ 4. & 5. part. 4.

[c] L. cedere diem. de verb. ſig. ff. & ibi Alciat. & Rebuff.

[d] L. ſi dies. ff. quando dies leg. ced. Si home deviſe 20 l. al W. S. deb. pay in 4 annes puis ſon mort, & devie, uncore lez Executors le deviſee avera le mony, ou le reſt de ceo devant L' ordinary. Brook Abridg. tit. Deviſe, n. 17. 45.

* DD. in d. L. ſi dies. & in L. ſi poſt diem. ff. quando dies leg. ced. Graſ. Theſ. com. op. § legat. q. 43. n. 3, 4, 5.

[f] L. dies incertus. ff. de cond. & demon.

[g] L. uhic. § ſin autem. C. de cad. toll.

[h] DD. in d. § ſin autem.

[i] Bar. in L. ſi cui. § hoc autem. de leg. 1. poſt gloſſ. in L. Sejus. ad Trebel. ff. & Alex. ibid. Mant. de conject. ult. vol. l. 11. tit. 20. n. 3. & eſt communis opinio, teſte Graſ. Theſ. com. op. § legatum. q. 43. n. 7. Legato Titio relict. ita ut Meviam duc. in uxorem, an ſit modale vel condicional. vide Men. tract. de præſump. lib. 4. præſ. 146. n. 17. Graſ. Theſaur. com. op. § legatum. q. 48. n. 2.

† Dyer fol. 59. Fulb. tit. deviſe, fol. 46.

In the third case, that is to say, when (11) the day is partly certain, and partly uncertain, we are to distinguish, whether the uncertainty be in respect of the question *whether*, or of the question *when*.

If the uncertainty be in respect of the question *whether*, not of the question *when*, as if the Testator do bequeath an hundred pound when his son shall come to the age of 21 years; (for here it is certain when he shall be of that age, but uncertain whether he shall live till he come to that age;) in this case we must yet again distinguish. For either the time is joyned to the substance of the disposition, as when the Testator saith, I give to A. B. an hundred pound when he cometh to the age of 21 years; and then the Legacy is not devolved to his Executors or Administrators, if he die in the mean time [k], (except in certain cases elsewhere before specified [l]:) or else the day is joyned to the execution or performance of the Legacy, as when the Testator doth bequeath to A. B. an hundred pound, which he willeth to be paid when the Legatary shall be of the age of 21 years; and then the Legatary dying in the mean time, his Executors or Administrators may recover the Legacy, when the time is expired the Legatary should have been of the age of 21 years if he had lived [m].

[k] Bar. in d. L. fi cui. § hoc autem. de leg. 1. L. fi Titio. in prin. quando dies leg.ced. ff. Vasq. de succeff. progreff. l. 3. § 29. n. 3.

[l] Supra part. 4. § 17. sub fin.

[m] L. ex his verbis. C. quando dies leg. ced. Bar. & Paul. de Castr. in L. fi cui. § hoc autem. ff. de leg. 1. Alex. in L. Sejus, ad Trebel. in fin. ff. Vasq. de succeff. progreff. l. 3. § 29. n. 3. verb. quandoque &c.

If the uncertainty be not in respect of the question *whether*, but of the question *when*, as if the Testator do bequeath to A. B. an hundred pound, when the Executor of the Testator shall die, or to be paid when the said Executor shall die; (for here it is certain whether the Executor must die, (we must all die,) but when he must die it is uncertain:) in this case the Legacy is not transmitted, the Legatary dying before the Executor of the Testator [n]. Howbeit this Legacy after another's death, if it be duly considered, is not onely uncertain in respect of the question *when*, but also in respect of the question *whether*; because it is uncertain also whether the Legatary shall over-live the Executor, not onely when the Executor shall die [o], as elsewhere hath been declared [p].

[n] L. hujusmodi. ff. quando dies legat. ced. DD. in L. hæres meus. de con. & demon. Ceval. de usufruct. mulier. n. 70, 71. quorum opinio est magis recepta, ut per Graf. Thef. com. op. § legatum. q. 43. n. 8. Vasq. de succeff. progreff. l. 3. § 27. n. 11.

[o] d. Hæres meus. de cond. & demon. ff.

[p] Supr. par. 4. § 17.

§ XXIV.

§ XXIV. Of the deſtruction of the thing bequeathed.

1. *The Legacy is extinguiſhed, if the thing bequeathed do periſh.*
2. *What if it periſh by the fact or negligence of the Executor?*
3. *What if the Legacy be generall, or do conſiſt in quantity?*
4. *What if one thing of two things be bequeathed, whereof the one doth periſh?*
5. *What if the thing bequeathed be not deſtroyed, but the form thereof altered?*

IF the (1) thing bequeathed do periſh or be deſtroyed, the Legacy is extinguiſhed [a], and the Legatary deſtitute of remedy. For example; the Teſtator doth bequeath unto thee his beſt oxe, which oxe is afterwards killed: in this caſe the Legacy is extinguiſhed [b], inſomuch that neither the skin, nor the fleſh, nor the price is due unto thee [c]. Which rule notwithſtanding is limited in certain caſes.

[a] § ſi res legata. Inſt. de lega. De hac q. vide Fulbeck tit. deviſe, fol. 41, 42, 43.
[b] L. mortuo bove. ff. de leg. 2.
[c] d. § ſi res legata. & ibi Minſing.

Firſt, when (2) the thing bequeathed doth periſh by the fact or negligence of the Executor: as when the Executor after the death of the Teſtator converteth the thing bequeathed to his own proper uſe [d]; or when he maketh delay, in not paying or delivering the thing bequeathed ſo ſoon as he may, after he hath undertaken the Executorſhip *; or doth unjuſtly defer the proving of the Will, and undertaking the Executorſhip [f], and the thing bequeathed periſh in the mean time: for then the Legacy is not ſo extinguiſhed, but that the Legatary may recover the value thereof, albeit the thing it ſelf be not extant [g]; and albeit peradventure it would have periſhed likewiſe ‖, if it had been delivered to the Legatary in due time [h].

[d] Gloſſ. in d. L. bove. & in L. lana. de leg. 3. ff.
* L. omnia. de leg. ff. Intelligе, ſi modo præcedat interpellatio, vel hominis, vel certæ diei. L. ſi ex legat. cauſa. ff. de verb. ob. ſed non ſufficit mora irregularis, nempe quæ ex juramento oritur. Cagnol. in L. quod te. ff. ſi cer. pe. n. 97. [f] L. equis. ff. de uſ. & fruct. [g] Paul. de Caſtr. in L. ſervum filii. § ſi pocula. de leg. 1. L. ſenatus. eod. tit. Mantic. de conject. ult. vol. l. 9. tit. 12. n. 3. ‖ Quomodo conſtabit rem etiam legatario traditam perire voluiſſe, vide Ripam in L. quod te. ff. ſi cer. pe. & Cagnol. in eand. L. n. 82. [h] Alex. Jaſ. & alii in L. nemo. de verb. ob. ff. quorum opinio eſt communis, ut refert Jaſ. ubi ſupra, & Soarez. l. recept. ſententiarum, litera M. ant. 222. de qua ſententia tanto minus dubitatur, quanto magis dubitatur an res apud legatarium peritura fuiſſet. Quod ſi manifeſte conſtat rem eodem modo fuiſſe perituram apud legatarium, hic multi recedunt ab illo communi dogmate, exiſtimantes æquiorem opinionem eſſe, ut non teneatur executor. Soarez. ubi ſupra. Ripa in L. ſi inſulam. de verb. ob. n. 97.

Secondly, when (3) the Legacy is generall, or conſiſteth in quantity: as when the Teſtator doth bequeath an horſe, or an oxe, (not this horſe, or that oxe;) or when the Teſtator doth bequeath certain quarters of wheat, or other grain, not this or that grain lying in ſuch a barn or garner: this kind of Legacy cannot periſh, though all the Teſtator's cattell do periſh, and all his corn be conſumed [i]; and therefore the Legatary may recover his Legacy. Unleſs ſome certain thing were offered to the Legatary, which he without juſt cauſe refuſed to take: for then, if the ſame thing do periſh afterwards, the Legacy is extinguiſhed [k].

[i] L. Incendium. C. ſi cer. pe. L. non amplius. § 1. de leg. 1. ff. Minſing. in § ſi res legata. Inſtit. de leg.
[k] L. hujuſmodi. § ſtichum. & § ſi cui. de leg. 1.

Thirdly, when (4) one of two things is bequeathed alternatively: as if the Testator do bequeath his apparell, or his books, the one of these being consumed, the other of them may be recovered [l]; unless the election appertaining to the Executor, he offered the one of them to the Legatary, which afterwards perished [m].

Fourthly, (5) when the thing bequeathed, whereof the form is altered, may be reduced to his first matter: as when the Testator doth bequeath some mass of metall, be it gold or silver, tin, or such like, whereof the Testator afterwards doth make some vessell, or other instrument: or, on the contrary, the Testator having bequeathed a cup of gold, or other vessell, or instrument of metall, doth afterwards dissolve the same to his first matter: or the Testator having bequeathed a cup of gold, doth make a chain thereof: the will of the Testator by such alterations is not presumed to be altered, and therefore the Legacy is not thereby extinguished [n].

But if the thing bequeathed, after the form thereof be altered, cannot be reduced to that which it was before; as Wool when it is made cloath, or Timber when it is hewen or made parcell of a ship; the Testator having bequeathed certain wooll or timber, and afterwards translating the same to other forms, from whence they cannot be reduced to the former, the Legacy is extinguished [o]: unless it do appear that the will of the Testator therein is not changed [p].

Other limitations there be of this rule, as also divers [q] other causes whereby Legacies may be lost: But neither have I convenient leisure to proceed in the discourse thereof; neither do I think the same either so needfull or profitable to be known, as these whereof I have made choice, and which I have already delivered. And therefore I thought good onely to refer such as are farther studious in that point, to their own more plentifull Libraries, and more serious labours, and here cut off the thread of this *Testamentary Treatise*.

[l] L. cum res. § sed si. de leg. 1.

[m] L. hujusmodi. § stichum. & § si cui. de leg. 1. L. statu. liberum. § ult. de leg. 2. ff.

[n] Bar. Lancel. Dec. & alii in L. servum filii. § si pocula. ff. de leg. 1. quorum opinio communiter approbatur, ut refert Jas. eod. §. n. 5.

[o] L. lana. ff. de leg. 3. Bar. Paul. de Castr. & alii communiter in d. L. servum filii. § si pocula. de leg. 1.

[p] d. § si pocula.

[q] De quibus plene Vigelius in sua methodo exactissima juris civilis, l. 12. c. 10. caus. 51. ubi enumerat 70 causas amittendi legata.

FINIS.

An Epilogue.

THUS *for thy love (loving Country-man) have I delivered unto the view of thy judgement the picture of my conceit concerning Teſtaments: which if thou ſhalt behold ſharply, then I fear ſtrongly, notwithſtanding my late Corrections and Additions, that yet ſtill thou wilt eſpie, in ſtead of juſt proportion, lameneſs, or want of ſome notable members; and in ſtead of delectable beauty, deformity, or ſpots of foul and loathſome errours. Wherefore as at the firſt I did earneſtly intreat for favour; ſo now in the end I do humbly beg for pardon. And although peradventure I might uſe ſome reaſons to draw thee thereunto, as by giving thee to underſtand, Firſt, that all the lims and bones of this my Teſtamentary picture were not onely heretofore out of joynt, but ſcattered and diſperſed far aſunder, ſome amongſt the Laws Civill, ſome amongſt the Decrees and Decretals, ſome amongſt our Provinciall Conſtitutions, and ſome amongſt the Laws, Statutes, and Cuſtoms of this Realm; and therefore the labour in ſearching and joyning of ſome of theſe diſmembred members to be rather thankfully accepted, then the not collecting of all to be accounted a fault; Secondly, that theſe manifold Laws being ſo contrary one to another, and the Interpreters of every ſeverall Law being at everlaſting variance amongſt themſelves about every ſentence, every word, and every letter almoſt, the blots and blemiſhes of the work are ſo much the more tolerable, by how much the ſimple Truth is often obſcured and miſtaken for Errour, and Errour (cloathed in Truth's garment) imbraced many times for Truth it ſelf, even of the Learned; And thirdly, that foraſmuch as no man hitherto, ſince* England *was* Albion, *hath ſet forth a perfect*

Dulcis amor patriæ ratione valentior omni.

fect Idea *of an* Engliſh *Teſtator, or a right pattern of a lawfull Teſtament within this Land; the Authour therefore in adventuring to break the ice, to make the paſſage eaſy for his Countrymen, failing ſometimes of the Ford, and falling into the pit, may ſeem worthy to be pitied, or at leaſt unworthy to be reprehended in this enterpriſe, no leſs profitable for this Commonwealth, then it is uſuall to die: Nevertheleſs, becauſe it more tendeth to the advancement of thy commendation, to be entreated, then perſwaded; and more fit for mine own ſafety, to crave with humility, then proudly to challenge that which may be denied; rejecting therefore theſe foreſaid reaſons, I do wholly ſubmit my ſelf unto thy courteſy, beſeeching thee to uſe me friendly, and either to pardon freely, or to admoniſh charitably: ſo ſhall I have juſt cauſe to commend thy vertue, and gladly amend any fault committed.* Farewell.

H. S.

A TA-

A TABLE of the moſt remarkable things contained in this TREATISE.

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